NO. 89-327

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, ET AL
Petitioners

VS.

LLOYD'S LEASING, ET AL
Respondents

VS.

CONOCO, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the owner/operator of an oil tanker afloat 70 miles from Galveston Island owe the island's beachfront residents and businesses a duty of care to prevent a massive oil spill?

(2) When the M/V Alvenus spilled 2.6 million gallons of oil into the Gulf of Mexico, 11 miles offshore and 70 miles from Galveston Island, was the risk of harm to beachfront property so unforeseeable as to place it beyond the scope of Respondents' legal duty of care to prevent massive oil spills?

(3) Did the scope of Respondents' duty to prevent massive oil spills extend to harm caused by people "tracking" the oil from Galvestson beaches to adjacent homes and businesses?

(4) Was it proper for the Fifth Circuit to reject the district court's basis for summary judgment, then affirm on grounds not advanced or argued before the district court?

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Petitioners certifies that the following is a complete list of all parties:

Petitioners:

Petitioners (Plaintiffs below) are 135 individuals and businesses directly harmed by the tracking of oil off from Galveston beaches. They are listed in Appendix E.

Respondents:

1. Lloyds Leasing, Ltd.
2. Cammell Laird Shipbuilding, Ltd.
3. Alvenus Shipping Company, Ltd.
4. Conoco, Inc.
5. Lake Charles Pilots, Inc.
6. Malcolm Gillis, Pilot
7. Mitchell Energy & Development Corp.
8. Mitchell Realty, Inc.
9. State of Texas.
10. Ms. Leonore M. Gutierrez Doody
11. Bob White, et al

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NO. _____

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TO THE HONORABLE UNITED STATES SUPREME COURT:

Come now, Petitioners and seek Writ of Certiorari to the Fifth Circuit's April 4, 1989 judgment and May 19, 1989 order refusing rehearing and pray that same issue in these regards.

OPINIONS BELOW

The Fifth Circuit Opinion, reported at ____F.2d____ (5th Cir. 1989), is attached as Appendix A. The Court's

order denying the Motion for Rehearing is attached as Appendix B. The district court's Memorandum and Order, reported at 697 F.Supp. 289 (S.D. Tex. 1987), is attached as Appendix C.

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Fifth Circuit entered judgment on April 4, 1989 and denied Petitioners' motion for rehearing on May 19, 1989.

FEDERAL STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

-A-

On July 30, 1984, M/T Alvenus ran aground just off the coast, 11 miles from Cameron, Louisiana. The grounding cracked the Alvenus' hull, producing a massive oil spill of 2-3 million gallons of heavy crude oil and tar. The U.S. Coast Guard expressed concern for damage to Galveston as early as the first day after the spill. U.S. Coast Guard landfall predicitions varied in the early hours after the oil spill, but on August 2nd, the Coast Guard issued an alert to Galveston and Respondents at bar set up a command post in Galveston and began hiring clean up crews. On August 4, 1984, the Alvenus' oil washed ashore in Galveston and continued to do so for over a month, causing enormous damage at the height of Galveston's summer tourist season.

-B-

Respondents at bar filed this limitation of liability

action per 46 U.S.C. 183. thereafter, over 375 claimants (among them Petitioners at bar) filed claims for damages caused by the massive oil spill. Respondents at bar moved for summary judgment and Petitioners responded. Respondents at bar did not raise foreseeability — the basis of the trial court's ultimate order and the 5th Circuit's decision — in their summary judgment motion. Their foreseeability argument came in a Reply to Petitioners' Response to Respondents' Motion for Summary Judgment.

The trial court entered partial summary judgment as to certain *claims* made by the "tracking damage" claimants (Petitioners), who moved to reconsider. On January 22, 1988, the trial court modified its earlier order, dismissing the "tracking damage" claimants themselves, despite substantial summary judgment proof that "tracking damage" from the massive oil spill was "highly probable". The gist of the trial court summary judgment was that "tracking" oil from the beaches into Petitioners' homes and businesses was not foreseeable. In its January 22 order, the trial court invited Petitioners to file another motion to reconsider, which was done. By order of April 14th, the trial court denied same. Harboring significant doubts, however, the trial court also *ordered* Petitioners to file an interlocutory appeal per 28 U.S.C. 1292(b).

On April 25, 1988, they did so. The 5th Circuit, by order of June 7, 1988, denied the interlocutory appeal[1] but held that the matter was, in any event, "appealable as of right". Appeal was thereafter docketed and timely proceeded. On April 4, 1989, the 5th Circuit reversed the trial court's holding but affirmed summary judgment per

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[1] "(T)he (trial) court did not properly certify the order appealed from as required by §1292(b)".

curiam, Judge Higginbotham concurring and dissenting in part. Suggestion for Rehearing En Banc and Motion for Rehearing timely followed, being denied on May 19, 1989. Application for Writ to this Honorable Court timely followed.

GROUNDS FOR GRANTING WRIT

Pursuant to Rule 17, there are special and important grounds for granting Writ:

(1) The 5th Circuit has decided questions of federal law which have not been, but should be, settled by this Honorable Court.

(a) Whether the owner/operator of an oil tanker afloat 70 miles from coastal communities owes the residents and businesses of those communities a duty of care to prevent massive oil spills?

(b) Whether the winds and tides that bring massive oil spills ashore constitute intervening causes that break the chain of foreseeability and preclude liability for resulting harm?

(c) Whether the fact that a coastal region is not fully developed provides a reason to conclude that the owner/operator of an oil tanker owes no duty to coastal communities in that region?

(d) Whether people tracking oil from beaches to adjacent homes and businesses constitutes an intervening cause that breaks tshe chain of foreseeability and precludes liability for resulting harm?

(e) Whether the ultimate destination of a

massive offshore oil spill must be predictable with certainty before there can be liability for resulting damages?

(f) Whether a 1-in-5 probability that a massive oil spill will drift to a heavily populated area renders that likelihood so unforeseeable as to preclude liability for resulting damages?

(2) The 5th Circuit decision, deciding a complex case of far-flung import on summary judgment, conflicts with guidance from *Kennedy v. Silas Mason*, 334 US 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 US 242, 255 (1986) and *Arenas v. U.S.*, 322 US 419, 434 (1944).

(3) The 5th Circuit decision conflicts with the doctrine of foreseeability applied in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), as well as *Consolidated Aluminum Corp. v. C.F. Bean*, 833 F.2d 65 (5th Cir. 1987) and *State ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1986).

(4) the 5th Circuit has sanctioned a gross departure from Fed.R.Civ.P. 56.

ARGUMENT AND AUTHORITIES

I

Generally

The 5th Circuit called for "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. *(Slip. Op.*, 2714 — Higginbotham, J., concurring and dissenting). Given the exoneration of an entire industry, the panel majority impacts far beyond this case and this oil spill. The absolution of the shipping industry

will discourage industry efforts towards greater safety measures, oil spill containment technology and mechanisms to predict oil spill landfall. What rational shipping executive would invest time and money in such matters, where to do so might remove an unbeatable defense to any liability at all?

II

Fifth Circuit's "Far-Reaching Exoneration of Shipping Industry From Responsibility" for Massive Oil Spills — Summary Judgment Contrary to Sound Public Policy

Judge Higginbotham accurately assessed the 5th Circuit's holding as calling for "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. (*Slip Op.*, 2714 — Higginbotham, J., concurring and dissenting in part).

Massive oil spills present complex issues of profound public import. These incidents visit heavy damage on a legion of individuals and impact business, quality of life, local/regional economy and the environment. Additionally, safety standards and rules, and accountability are implicated. This case (and that presented by the recent Alaska spill[2]) stand as examples.

This Honorable Court has repeatedly cautioned *against* summary disposition of cases involving complex issues of profound public import:

> *(S)ummary Judgment procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of*

---

[2] The Alaska oil spill was characterized by the Court setting the Captain's bond as the worst disaster since Hiroshima.

> *far-flung import.* . . . We consider it . . . good judicial administration to withhold decision of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.
>
> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be *lacking in the thoroughness* that should precede judgment of this importance and which it is the purpose of the judicial process to provide. (emph. added).

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (citing *Silas* with approval); *Arenas v. U.S.*, 322 U.S. 419, 434 (1944) ("duty of court . . . can be discharged in a case of this complexity only by trial. . . . ", reversing summary judgment)[3]

The wisdom of this cautionary principle is seen at bar. On a record developed only by affidavit and legal argument, 135 Petitioners heavily damaged in a massive oil spill are precluded from relief — despite 5th Circuit agreement that the "tracking damage" they suffered was a foreseeable and probable result of the presence of oil on Galveston beaches. With the 5th Circuit opinion as precedent, an oil tanker owner/operator may be absolved from liability simply with an affidavit swearing an inability to predict exactly where the oil spill "bullet" would hit. Issues of profound public import — such as massive oil spills — should not be decided by affidavit in a summary

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[3] This is also the 5th Circuit rule. *U.S. v. Fryd Constr. Corp.*, 423 F.2d 980, 984 (5th Cir. 1970); *Heywood v. Pub. Housing Administration*, 238 F.2d 689, 698 (5th Cir. 1956).

judgment procedure.

Petitioners have no quarrel with the principle of "foreseeable risk" employed by the 5th Circuit to determine the scope of Respondent's duty of reasonable care. That principle limits a tortfeasor's responsibility to:

> harm of a general sort to persons of a general class which might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention.

Slip Op., 2713, quoting from *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68 (5th Cir. 1987). Surely, Respondents might have anticipated the likelihood that spilling two to three million gallons of oil so near the coast would damage coastal businesses and other beachfront property. One day after the spill, the Coast Guard raised concerns about damage to Galveston and its staff met with Galveston officials to take protective measures.

However, the 5th Circuit exonerated Respondents, concluding that there was no reason to anticipate that the oil would reach a "heavily populated area". This conclusion was derived from the fact that the spill occurred 70 miles from Galveston and that only 60 miles of 340 miles of coastline from Calcasieu, Louisiana to the Mexican border was "developed". According to Justice Higginbotham, this reasoning:

> calls for far-reaching exoneration of the shipping industry from responsibility to the gulf coast, making curious indeed our effort in the *Testbank* line of cases to adopt a pragmatic limitation on the doctrine of foreseeability. *Slip. Op.*, 2714.

"Stripped to essentials", the 5th Circuit holds that vessel owners "owe no duty shoreward" — at least not to residents of the Texas coast. *Id.* So long as the oil tanker is far enough from the Texas coast that an oil spill might make landfall in an undeveloped area, the vessel owner owes no duty of care to Texans. Stated differently, unless and until Texas chooses to fully develop its coastline, owners of tankers in the Gulf owe no duty to coastal residents. This narrow concept of legal duty conflicts with the views of this Court, as well as other federal circuits, including the Fifth Circuit itself.

In *Union Oil Co. v. Oppen*, 501 F.2d 558, 569 (9th Cir. 1974), the 9th Circuit held that damage caused to coastal fishermen — when "vast quantities of raw crude oil were released and subsequently carried by wind, wave and tidal currents over vast stretches of . . . coastal waters . . ." was foreseeable. The crucial consideration for the 9th Circuit was not whether it could be predicted exactly where the oil would drift. Rather, foreseeability resided in the fact that defendants could reasonably foresee that negligently conducted drilling operations "might diminish aquatic life and . . . the business of commercial fishermen". As the court said, "The dangers of pollution were and are known even by school children." *Id.*, at 569. Similarly, Respondents at bar could reasonably foresee that spilling 2-3 million gallons of oil 11 miles from the Gulf Coast might adversely impact on a populated coastal community. The U.S. Coast Guard certainly did! *See also, Arizona Copper Co. v. Gillespie*, 230 US 46, 57 L.Ed. 1384 (1912) (riparian owner may recover property damage caused by pollution 25 miles upstream).

The 5th Circuit has generally adopted a more liberal stand regarding foreseeability in the context of admiralty cases. For example, in *Horton & Horton, Inc. v. T/S J. E.*

DYER, 428 F.2d 1131, 1135 (5th Cir. 1970), the court made the following comment about foreseeability and intervening causation:

> In determining causation in maritime matters, the applicability of such doctrines as . . . interruption of negligence by a subsequent intervening negligence is questionable. "[T]he maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party."

Gilmore & Black, *The Law of Admiralty*, p. 404 (1957). See also, *Commercial Transport Corp. v. Martin Oil Service*, 374 F.2d 813, 817 (7th Cir. 1970).

IV.

THIRD PARTY HUMAN INTERVENTION: "TRACKING DAMAGE" WAS "VERY COMMON", "VERY LIKELY" AND "HIGHLY PROBABLE" – NOT "HIGHLY EXTRAORDINARY" AS A MATTER OF LAW

The trial court held that "tracking damage" was not recoverable because third party human intervention (those who tracked oil off the beaches) broke the causal chain of foreseeability (Ex. C — Order of 1/22/88, at 4). The 5th Circuit, however, disagreed with the trial court and held that "tracking damage" was a "common sense conclusion"[4], agreeing with Petitioners that "tracking damage" was probable and foreseeable.[5]

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[4] *Slip, Op.*, at 2713.

[5] *Id.*, at 2713-14. Petitioners presented expert affidavits below that establish "tracting damage" from a massive oil spill as "common", "very likely" and "highly probable". (Tr. 1165-76 — U.S. Coast Guard

Nunley v. M/V Dauntless, 727 F.2d 455 (5th Cir. 1984) adopted *Rest. of Torts* 2d §§442, 447. There, the 5th Circuit held that the negligence of an intervening third party does *not* break the causal chain if:

> (a) the actor at the time of his negligent conduct should have realized that a third party person might so act (i.e., track oil off the beach into Appellants' homes and businesses), *or*
>
> (b) a reasonable man knowing the situation existing when the act of a third party was done (i.e., when the oil was tracked off the beaches into Appellants' homes and businesses) would not regard it as *highly extraordinary* that the third party would so act, *or*
>
> (c) the intervening act (i.e., tracking oil off the beach into Appellants' homes and businesses) as a normal consequence of a situation created by the actor's conduct in a matter in which it is done is not *extraordinarily negligent.*

Id, at 464-5.

Given the summary judgment proof that "tracking damage" from massive oil spills was "common" and "highly probable" (Tr. 1165-76), it cannot be said — as a matter of law — that the "tracking damage" at bar was so "highly extraordinary" as to break the causal chain. It would have been extraordinary had "tracking damage" not occurred! The inconsistency of the 5th Circuit with *Nunley*

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[5] continued. Veteran of 20 years experience in oil spill investigation and clean-up, president of oil spill clean-up company involved in over 100 oil spills, college professor training oil spill clean-up personnel for 11 years, etc.).

guidelines introduces uncertainty into an already complicated field of law.

Watz v. Zapata Offshore Co., 431 F.2d 100 (5th Cir. 1970) adopted *Rest. of Torts* 2d §435(i), holding that

> if the actor's conduct is a substantial factor in bringing about the harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred *does not* prevent him from being liable. (emph. added).

Id, at 116. the conduct at bar was Respondents' negligence producing a massive oil spill on the Gulf Coast — obviously a "substantial factor" in bringing about Petitioners' harm. Under *Watz*, Respondents cannot be absolved, even if *(arguendo)* they did not foresee the "common" and "highly probable" tracking of oil off the beaches into Petitioners' homes and businesses.

V

THE 5TH CIRCUIT'S NEW TEST

The 5th Circuit misconstrued the proper "foreseeability" test.[6] In a nutshell, it held that Petitioners' harm was not foreseeable as a matter of law — because Respondents could not predict that individuals and businesses would probably be harmed. Under this new

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[6] The 5th Circuit agreed that "Appellee [Respondents] might reasonably anticipate that the oil might wash ashore somewhere. . . . " (*Slip Op.*, 2713) but concluded that since the precise coastal point to be hit by the oil spill "bullet" was not foreseeable, neither was the harm. (*Id*). Thus, the 5th Circuit reasoned that — since Respondent did not precisely know that the oil spill would wash ashore in Galveston — Petitioners' harm was not foreseeable and Respondents were absolved of liability.

standard, a defendant shooting a gun into a crowd would be absolved from liability because he did not know precisely who the bullet would hit![7] This is not the correct "foreseeability" test.

The 5th Circuit cited the correct test,[8] but misapplied and re-wrote it. As announced in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987):

> harm . . . (is) . . . foreseeable . . . if (1) harm of a *general* sort (2) to persons of a *general* class (3) *might* have been anticipated by a *reasonably thoughtful* person, (4) as a *probable* result of the act or omission, (5) considering the interplay of *natural forces* and *likely human intervention*. (numbering and emph. added).

The 5th Circuit based its decision on the "persons of a general class" element,[9] reasoning that if oil spill landfall at Galveston was not *predicted with certainty*, then — as a matter of law — harm to the Galveston Petitioners was not foreseeable. This "certainty" requirement is *not* the *Consolidated* standard; it is a new, incorrect standard, deleting *Consolidates's* "general class" element and substituting an onerous "predictable with certainty" element.

Consolidated requires that harm of some type ("a general sort") "might have been anticipated" to be visited upon "persons of a general class". That "general class" is

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[7] *Slip. Op.*, 2714 (Higginbotham, J., concurring and dissenting).

[8] *Slip. Op.*, 2713, citing *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987).

[9] *Slip. Op.*, 2713.

Gulf Coast residents and businesses.[10] *Consolidated* does not require the victims to be identified with exactitude — prior to the oil spill landfall — but only that the "general class" of victims potentially to be harmed be identifiable. *cf: State of La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc) (noting that a general class of "commercial fishermen were foreseeable, Plaintiffs whose interests . . . (Defendant) had a duty to protect. . . .").

Under the 5th Circuit's new standard, "foreseeability" now requires that oil spill victims be identified prior to landfall. Under the *Consolidated* "foreseeability" standard, however, the "general class" element is met by simply demonstrating "anticipation" of landfall along the Gulf Coast, the "general class" being persons and businesses in that "general" area. Indeed, the "data" relied on by the 5th Circuit reflects a 1-in-5 probability for the oil spill "bullet" to hit populated Gulf areas like Galveston, establishing a 1-in-5 probability of harm to Petitioners.[11] More exactitude than even a 1-in-5 probability of harm is now required! This is not *Consolidated's* "general class" element; it is something new and onerous — and an exoneration of the shipping industry from responsibility for massive oil spills.[12] *cf: Testbank, supra* at 1032-3 (Gee, J., concurring).

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[10] *Consolidated* dealt with persons and businesses suffering harm up to *6 miles* inland; Petitioners at bar suffered harm within *300 yards inland.*

[11] *Slip. Op.*, at 2713 (reflecting 340 miles of coastline, 60 miles being populated like Galveston). Indeed, landfall at Galveston was by the third day after the spill — 2 days before it washed ashore. *Coast Guard Report* (4/23/85), pp. 6-7.

[12] *Slip. Op.*, 2713 (Higginbotham, J.r, concurring and dissenting).

The risk at bar is damage due to tracking oil off the beaches into homes and businesses. This risk (as all panel members agreed — *Slip Op.*,2713-14) was foreseeable and probable. Indeed, Petitioners tendered expert testimony that "tracking damage" was a "common", "very likely" and "highly probable" result of a massive oil spill. (Tr. 1165-76). The 5th Circuit however, extended *Consolidated* to exonerate the shipping industry in almost all oil spills (Slip. Op., 2714). The new standard adds an extra (and near insurmountable) layer atop the "foreseeability" test — to avoid summary judgment. One must now establish as a matter of law that the oil spill's precise landfall was predictable. Foreseeability does not require a crystal ball.

VI

ONE-IN-FIVE PROBABILITY — NOT ENOUTH FORESEEABILITY AS A MATTER OF LAW?

The 5th Circuit, contrary to *Consolidated's* "general class" element, now requires oil spill landfall to be predicted with certainty before harm is "foreseeable". The import of the 5th Circuit decision is that a 1-in-5 probability[13] of harm is insufficient to raise a fact issue to bar summary judgment in this case of profound public import. A 1-in-5 probability of harm more than meets *Consolidated's* "general class" of victims elements. A 1-in-5 probability of harm does not establish — as a matter of law — that harm was not "FORESEEABLE".

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[13] *Slip. Op.*, 2713 (340 miles of coastline, 60 miles being populated, yields an approximate 1-in-5 probability of oil spill landfall.

VII

THE ULTIMATE IRONY: TRIAL COURT: OIL HITTING GALVESTON IS FORESEEABLE BUT "TRACKING DAMAGE" IS NOT; 5TH CIRCUIT — "TRACKING DAMAGE" IS FORESEEABLE BUT OIL HITTING GALVESTON IS NOT

This case presents the ultimate irony. The trial court held Petitioners' "*tracking damage*" was not foreseeable,[14] although it *was* foreseeable for the oil spill "bullet" to hit Galveston. The trial court allowed certain classes of Galveston Claimants to recover for direct physical harm and for damages due to oil-laden windblown mist. The 5th Circuit, contrary to the trial court, agrees that "tracking damage" *was* foreseeable[15] but — going beyond the trial court decision on a matter *no one* appealed — held that oil on Galveston beaches from the massive oil spill *was not* foreseeable![16] Judge Higginbotham noted the distinction between the decision appealed from and the basis of the 5th Circuit's ruling (*Slip Op.*, 2713-4 — i.e., trial court found "*tracking damage*" not foreseeable (which all panel members disagree with) but majority found *oil spill landfall at Galveston* not foreseeable). The ultimate irony is

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[14] App. C — (Order of 1/22/88 at 4):

> "as a matter of law, . . . the damages . . . resulting from the *tracking of oil* were not foreseeable.*** (T)he damages were indeed possible but in no fashion probable. The element of third party intervention that allowed the oil to be carried *from the beaches* to claimants' foreseeability". (emph. added).

[15] *Slip. Op.*, 2713. Judge Higginbotham (concurring and dissenting) also agrees that Petitioners' "tracking damage" was foreseeable (*Slip. Op.*, 2714).

[16] *Slip Op.*, 2713.

that the 5th Circuit opinion turns on a ruling below from which *no one* appealed! Petitioners obviously did not challenge any ruling that it was foreseeable for the oil spill "bullet" to hit Galveston; Respondents filed no cross-appeal and no cross-points.

CONCLUSION

The 5th Circuit, discarding *Testbank* and *Consolidated*, presents "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. *(Slip Op.*, at 2714 — Higginbotham, J., concurring and dissenting). Thus, the import of its opinion reaches far beyond this case and this oil spill. So long as tanker owners/operators can claim inability to predict oil spill landfall with certainty, oil spill harm is not "foreseeable" as a matter of law, absolving them of liability. In policy terms, such a state of law will hardly encourage industry efforts toward greater safety measures, oil spill containment technology and techniques of predicting oil spill landfall. Indeed, a rational industry executive would be *discouraged* from investing time and money in such critical areas, because to do so might remove an unbeatable defense to liability.

The 5th Circuit presents a new "foreseeability" standard, abandoning *Testbank's* "pragmatic limitation on . . . foreseeability"[17] and *Consolidated's* "general class" of victims element. Contrary to these authorities, the new standard requires oil spill landfall to be predicted with certainty before oil spill harm may be "foreseeable". This onerous

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[16] *Slip Op.*, 2713.

[17] *Slip. Op.*, 2714 (Higginbotham, J., concurring and dissenting). Judge Higginbotham authored *Testbank*.

standard would absolve the industry from almost all oil spills, as it would absolve one from liability for shooting into a crowd where one could not predict who the bullet would hit. *Slip Op.*, at 2714).

the 5th Circuit recites data reflecting a 1-in-5 probability that the oil spill "bullet" would harm populated Gulf areas like Galveston. Even a 1-in-5 probability of harm is not enough" foreseeability" of harm — as a matter of law — under the new standard! Besides a divergence from the law, a 1-in-5 probability of harm, at the least, presents a fact question as to the foreseeability of harm, barring summary judgment.

WHEREFORE PREMISES CONSIDERED, Petitioners pray that the Petition be granted, the Fifth Circuit Opinion regarding these complaints be reversed and remanded with instructions, costs be assessed against Respondents and for such other relief as may be just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ have been served on opposing counsel on this the 17th day of August, 1989, as follows:

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APPENDIX A

In the Complaint and Petition of LLOYD'S LEASING LIMITED. As Owner, and Cammell Laird Shipbuilding, Ltd., et al.,

Petitioners-Appellees

v.

CONOCO, Claimant-Third Party

Defendant-Appellee

v.

Bob WHITE et al, Claimants-Third Party

Plaintiffs-Appellants.

v.

U.S. ARMY CORPS OF ENGINEERS, Lake Charles Pilots, Inc. and Simrad Subsea, Inc. of Oslo Norway, Third Party

Defendants-Appellees

In the Complaint of Petition of LLOYD'S LEASING LTD., etc., et al.

Petitioners-Appelles

v.

Willis LUCAS, et al., Claimants-Appellants.

Nos. 88-2350, 88-2515.

United States Court of Appeals,
Fifth Circuit.

April 4, 1989.

Owners of property approximately 70 miles from site of ship's grounding filed claims in shipowner's limitation of liability action to recover for damages caused when oil spilled from ship washed ashore and was tracked onto their property by tourists and beachgoers. The United States District Court for the Southern District of Texas. Hugh

Gibson, J., entered summary judgment against property owners, and they appealed. The Court of Appeals held that harm suffered by property owners was not foreseeable. – Affirmed.

Patrick E. Higginbotham, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. SHIPPING 209(15/8)

Issue of whether harm suffered by property owners as result of ship's grounding and resulting oil spill was foreseeable was properly addressed by trial court in limitation of liability proceeding because determinination of tort-feasor's duty and its parameters, including foreseeability, is function of court rather than of jury.

2. SHIPPING 81(1)

Harm suffered by property owners when oil spilled from ship that ran aground was washed ashore apporximately 70 miles from site of grounding and tracked onto property by tourists and beachgoers was not foreseeable; ship owner therefore owed no duty to property owners and property owners' claim were properly dismissed in shipowner's limitation of liability action.

Appeals from the United States District Court for the Southern District of Texas.

Before GEE, HIGGINBOTHAM, and DUHE, Circuit Judges.

PER CURIAM:

In July 1989 the M/T Avenues grounded in the

Calcasieu River Bar Channel about eleven nautical miles south/southeast of Cameron, Louisiana. As a result of the grounding one of the ship's tanks cracked, spilling 65,500 barrels of crude oil into the waters of theGulf of Mexico. Given the particular combination of tides and winds that existed at the time of the spill, the oil washed ashore on Galveston Island, approximately 70 miles west of the site of the grounding.

Following the accident the peteitioners appellees filed an admirality limitation of liability action. Over 375 claimants filed claims against the petitioner and third party defendants. The trial court divided the claimants into four groups based on the type of damages sustained. One of these groups consisted of claimants who suffered damages from oil tracked onto their premises by tourists and beachgoers. The appellants are the members of this group of claimants. In January 1988 the trial court granted the petitioners/appellees' motion for summary judgment as to this group of claimants. The basis for the court's decision was that these claimants were barred from recovery because the damage to them was, as a matter of law, not foreseeable. The appellants contend that the trial court erred in granting summary judgment. Because we agree with the district court's conclusion that the harm suffered by the appellants was not foreseeable we AFFIRM the judgment of the district court.

> The [Supreme] court has stated that Fed.R.Civ.P. 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to this case and on which he bears the burden of proof. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact.

Washington v. Armstrong World Industries, Inc. 839 F.2d 1121 (5th Cir.1988) (citation omitted).

To establish a cause of action based on negligence the plaintiff must establish the existence of four elements. These elements are: "(1) the defendant was under a duty to the plainttiff to use due care, (2) the defendant was guilty of a breach of that duty, (3) the plaintiff has suffered *damages*, and (4) the breach of the duty *proximately caused* these damages." *Morris, Morris on Torts.* 44 (2nd Edition) (emphasis in original). In this case the district court granted the appellees' motion for summary judgment based on its determination that the appellants had failed to establish the existence of one of these elements, i.e., that the defendant had a duty to the plaintiff. This determination was in turn, based on the court's conclusion that the harm suffered by the plaintiff was not foreseeable.

[1,2] The appellants advance two arguments for reversal: First, the foreseeability is a question of fact and should not be decided as a matter of law; Second, that summary judgment was inappropriate because the affidavits of their experts raised a material fact issue.

In *Consolidated Aluminum Corporation v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir.1987) we stated that "[d]etermination of the tortfeasor's duty, and its parameters, is a function of the court. That determination involves a number of factors, including most notably the foreseeability of the harm suffered by the complaining party." (citations omitted) The district court therefore properly addressed the issue of whether the harm suffered by the plaintiff was foreseeable. We must now determine whether it correctly decided that issue.

In *Consolidated Aluminum Corp. supra*, we held that

[d]uty . . . is measured by the scope of the risk that negligent conduct foreseeably entails . . . and marks the limits placed on a defendant's duty . . ." *Id.* at 65. (citation omitted)

The court went on to state that harm is "the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." *Id.* at 68.

Applying this definition, we conclude that the district court's determination that the harm suffered by the plaintiffs was not foreseeable and that the appellees therefore owed no duty to the appellants is correct. The original oil spill occurred seventy (70) miles from Galveston in the Gulf of Mexico. The coastline between Calcasieu, Louisiana, the site of the spill, and Port Isabel, on the Mexico border, extends for approximately 340 miles. Approximately 60 miles of this coastline is developed. To produce the possibility of tracking damages such as these the oil had to wash ashore on a developed shore, where there were people to track it and places to track it into. The appellants' experts testified that tracking damages are a probable consequence of oil spills that wash ashore in inhabited areas, a commonsense conclusion that gains little force when voiced by an expert. Their testimony did not, however, address the probability that this oil spill would wash ashore in such an area. Therefore their testimony does not preclude a grant of summary judgment. While the appellee might reasonably anticipate that the oil would probably wash ashore somewhere, it had no reason to have anticipated that the oil would probably wash ashore in a heavily polulated area and then be tracked into businesses

and homes. "[T]o be found liable a defendant must have 'knowledge of a danger, not merely possible by probable . . .'" *Id.* at 68. (citation omitted).

In light of these facts we conclude that the appellants have failed to establish a requisite element of a negligence action. i.e., that the 'harm to the appellants was foreseeable and that the appellees therefore owed a duty to the appellant. Consequently the district court properly granted the appellees' motion for summary judgment.

The judgment of the district court is

AFFIRMED

PATRICK E. HIGGINBOTHAM.
Circuit Judge, concurring in part and dissenting in part:

The M/V Alvenus ran aground in the Calcasieu Channel Pass off the Louisiana Coast in the Gulf of Mexico. When its hull split it spilled between two and tree million gallons of heavy crude oil and tar approximately eleven nautical miles off the coast. Most of the crude oil floated ashore along the Gulf Coast and the Galveston County area. The predictable result was a significant downturn in the fortunes of surrounding businesses dependent on the tourist trade. Confronted with our opinion in *State of La. ex rel. Guste. v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1989) (en banc) (no recovery of economic losses absent physical injury to a proprietary interest),an innovative group of merchants located in the vicinity of the oiled beach suggest that they suffered the requisite physical injury in that beachgoers, their customers, tracked the sticky oil residue into their businesses. They offered "expert testimony" in opposition to summary judgment for the self-evident proposition that such "tracking" is the

foreseeable consequence of the spill. The district court granted summary judgment concluding that such damage was not foreseeable. The majority here affirm that decision, apparently concluding that it was not foreseeable that the oil would find its way to this beach. With deference, although I am in substantial agreement with the majority over the outcome of this case, I would travel a different path.

In *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68, we explained how foreseeability limits the tortfeasor's duty. We explained that it is "the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention."

I am persuaded that spilling millions of gallons of crude oil into the sea eleven miles off the gulf coast created a direct and foreseeable risk of tainting the coastline. It is no answer that the precise coastal point to be hit was not foreseeable; it is enough that the risk realized be within the set of foreseeable risks. Defendants point to the seventy-mile movement of the spill and the weather and winds that might have brought the oil ashore elsewhere. Stripped to essentials, defendants urge that the vessel owner owed no duty shoreward. This argument calls for far-reaching exoneration of the shipping industry from responsibility to the gulf coast, making curious indeed our effort in the *Testbank* line of cases to adopt a pragmatic limitation on the doctrine of foreseeability.

In *Testbank*, the collision in the Mississippi River blocked river traffic causing "wave upon wave of successive economic consequences" up the river and around it.

We confined recovery for injury to persons who suffered a physical injury to a proprietary interest. For the reasons that we explained there, we refused to allow recovery to extend to the full reach of forseeability.

The defendants in today's case would have us believe that foreseeability encompasses little more that specifically identified and inevitable outcomes. But surely the duty of a person firing a gun into the air in a populated area extends to all persons in the zone of danger of his acts. That is the essence of duty and foreseeability.

The majority understandably balks at the claims of businesses who point to the tracking of oil. I would find the answer in *Testbank*, rather than in a forced reading of foreseeability, for the reasons we there explained. Our insistence upon physical injury to a proprietary interest was a forth-right pragmatic limit on the doctrine of foreseeability. Undoubtedly many persons suffered some foreseeable physical loss and yet were not allowed to recover general economic losses. These physical losses were not a direct consequence of the collision and spill but were the secondary consequences of shipping delays.

Testbank limits which parties can recover for foreseeable injuries. In this appeal, the claimants' only physical injury is two parties removed from the mosts immediate *Testbank* plaintiff, the owner of the affected shore property. The spillage came to rest upon the property of one party, and was then removed by a second party—the sticky-footed interlopers—onto the property of still a third party, the plaintiffs in this case. Arguably such injury is a foreseeable consequence of the spill, but its nexus with the spill is a step removed, and so the plaintiffs are beyond the ambit of permissible claimants under *Testbank*.

I would hold that these claimants cannot recover general economic losses attributed to the general loss of custom attending the spill because they have no physical injury within the meaning of *Testbank*. I would affirm the summary judgment for defendants, to this extent, allowing them to proceed only with their claim for losses attributable to actual physical injury and any losses which *that* physical injury cause. I would not allow recovery for losses attributable to the general loss of customers resulting from the spoiled beach.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-2450
88-2515

In the Complaint and Petition of LLOYD'S LEASING LIMITED, As Owner, and Cammell Laird Shipbuilding, Ltd., et al, Petitioners-Appellees,

v.

CONOCO, Claimant-Third Party Defendant-Appellee

v.

Bob WHITE et al., Claimants-Third Party Plaintiffs-Appellants,

U.S. ARMY CORPS OF ENGINEERS, Lake Charles Pilots, Inc. and Simrad Subsea, Inc. of Oslo Norway, Third-Party Defendants-Appellees.

In the Complaint & Petition of LLOYD'S LEASING Ltd., etc., et al., Petitioners-Appellees,

v.

Willis LUCAS, et al., Claimants-Appellants.

Nos. 88-2450, 88-2515

FILED
MAY 19 1989

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Appeal from the United States District Court for the Southern District of Texas

- - - - - - - - - - -

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 4, 5 Cir., 1989, ____F.2d____)

(MAY 19, 1989)

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX C

In the Matter of the Complaint & Petition of LLOYD'S LEASING LTD., as Owner & Cammel Laird Shipbuilders., Ltd. and Alvenus Shipping Co., Ltd., As Charterers or Owners Pro Hac Vice, of the M/T ALVENUS, Her Engines, Tackle, etc., In a Cause of Exoneration From or Limitations of Liability.

No. Civ. A. G-84-293.

United States District Court,
S.D. Texas,
Galvestson Division.

Jan. 22, 1988.

During limitation of liability action by owner and charterer of tanker whose cracked hull caused oil spill which was beached at city, petition for summary judgment as to claims was filed. The District Court, Hugh Gibson, J., held that: (1) recovery was denied to persons who claimed economic damage exclusive of physical damage; (2) damages caused by tracking the oil deposit from beach were not foreseeable; (3) state was proper party to assert loss of sand and beach; (4) direct physical damages were recoverable; and (5) class certification was denied to shrimpers allegedly injured by the spill.

So ordered.

1. Navigable Waters 35

Owner and charterer of oil tanker which had cracked

hull and caused oil spill which beached was not liable to those persons who claimed economic damage exclusive of any physical damages by the effects of the oil on the beach.

2. Navigable waters 35

Damages to property resulting from persons tracking oil deposit from city beaches onto property, following beaching of oil spill caused by tanker with cracked hull, were not sufficiently foreseeable to allow recovery in limitation of liability proceeding; third-party intervention which allowed oil to be carried from beaches to claimants' property broke chain of foreseeability.

3. Navigable Waters 35

State, not private citizens, was proper party to assert loss of sand, loss of beach, loss of vegetation and resulting economic loss caused by beaching of oil slick after tanker developed split in its hull and spilled oil off shore.

4. Navigable Waters 35

Direct physical damages resulting from beaching of oil slick caused by tanker with cracked hull which was carried to beach by currents and waves were foreseeable and recoverable in limitation of liability proceeding.

5. Federal Civil Procedure 181

Shrimpers whose businesses were allegedly damaged by arrival of oil slick caused by leading tanker were not entitled to class certification in limitation of liability proceeding; presence of only six shrimper plaintiffs after publicity attending spill and repeated notices demonstrated that class certification would not advance

the litigation. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Charles R. Houssiere, III, Houstson, Tex., for White, et al.

Mike Gallagher, Fisher, Gallaher, Perrin & Lewis, Houston, Tex. for J.L. Sasser.

Susan Thiesen, Asst. Atty. Gen. and Ben F. McDonald, Jr., Sp. Asst. Atty. Gen., Atty. General's Office, Austin, Tex. for State of Tex.

H.S. Morgan, Jr., Theodore G. Dimitry, Vinson & Elkins, Houston, Tex., for Conoco.

George W. Lederer, Jr., Paul W. Wommack, Ralph K. Harrison, The Woodlands, Tex., for Mitchell Development Corp. of the Southwest, Mitchell Realty Co., The Fort Crockett Hotel Ltd., and George P. Mitchell.

Charles Houssiere, Houssiere & Durant, Houston, Tex., for Earl Stark.

Steve Williams, for City of Galveston.

Ervin A. Apffel, Jr., McLeod, Alexander, Powel & Apffel, Galveston, Tex. for Mitchell Duncan, Ski Trek, Inc. and City of Galveston.

Gordon Speights Young, Jack Shepherd, Houston, Tex., R. Scott Blaze, Trial Atty., U.S. Dept. of Justice, Washington, D.C. for U.S.A, U.S. Army Corps of Engineers, Colonel Eugene Witherspoon.

Beck Smith, Smith & Stowers, Galveston, Tex., for David Richard, Theo Carroll White, Charles Richard and Billy Kesel.

Lester J. Lautenschlaeger, Jr., Lautenschlaeger & Oberhelman, New Orleans, La., for third party defendant Malcolm Gillis and Lake Charles Pilots, Inc.

James Patrick Cooney, John M. Elsley, Royston, Raynor, Vickery & Williams, Housston, Tex., for third party Silver Line, Ltd., and Silver Navigation, Ltd.

MEMORANDUM AND ORDER

HUGH GIBSON, District Judge.

The genesis of the current limitation of liability action before the Court is to be found in 1984 when the M/T ALVENUS, on a voyage from Venezuela to Lake Charles, Louisiana, sustained a crack in her hull while in the Calcasieu Pass Channel of the Gulf of Mexico. The epicenter of the resultant oil spill was approximately seventy miles distance from Galveston, Texas, and took several days to reach the coastal city. Over 375 "Galveston" claimants have filed claims against petitioners alleging damages of varied and sundry natures.

Petitioners have filed four motions for summary judgment, two of which were granted by this Court on November 20, 1987. Claimants, in response, have filed a joint motion to vacate and set aside the November orders. Six of the claimants have also filed a motion for class certification. The ensuing responses and replies have become "fragmented" and have led "to a confused presentation." Cononco's Reply Memorandum to Pollution Claimants' Responses to Motion for Summary Judgment. In order to

clarify the present legal and factual conundrum, the Court will lay forth the legal principles by which it will decide the case *sub judice.*

Petitioners have placed the claimants in three categories based on the alleged damage suffered.[1] The Court, although declining to follow petitioners' classification scheme, will, likewise, categorize the claimants in question according to damages suffered. Claimants will be classified in the following manner:

> (1) those who suffered economic loss exclusive of physical damage;
> (2) those who suffered "tracking" damages and resultant economic loss; and
> (3) those who suffered direct physical impact damages and resultant economic loss.

Thus, two of the three groups of claimants have suffered some type of physical damage in addition to the alleged economic loss.

(1) As to the first category of claimants, *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir.) *(en banc), cert. denied,* 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986) controls. The Court, in *Testbank,* held that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort." 752 F.2d at 1020. the claimants in the first category are, therefore, precluded from seeking economic damages and the Court's summary judgment order of November 20, 1987, dismissing claimants therein

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[1] A fourth category is based upon a group of claimants who allegedly failed to respond to petitioners' interrogatories. As to this fourth category, petitioners seek default judgments

will be left undisturbed. Those claimants who are of the opinion that they should not be considered under the first category of claimants as delineated by the Court should file individual, specific motions for reconsideration within twenty (20) days of the date of this order.

In *Consolidated Aluminum Corp. v. C.F. Bean Corp.* 772 F.2d 1217 (5th Cir. 1985), the Court determined that *Testbank* did not apply because plaintiff had "suffered physical harm to property in which it [had] a proprietary interests." *Id.* at 1222. The harm to plaintiff in *Consolidated* consisted of damage to the physical equipment at plaintiff's aluminum plant. *Id.* at 1218. the Fifth Circuit remended the case for analysis under traditional tort principles applied in admiralty. *Id.* On a second appeal, the Fifth Circuit affirmed the trial court's finding that the damage to plaintiff in *Consolidated* was not foreseeable as a matter of law. *Consolidated Aluminum Corp. v. C.F. Bean*, 833 F.2d 65, 68 (5th Cir.1987), *Aff'g*, 639 F.Supp. 1173 (W.D.La. 1986). The Fifth Circuit, in affirming the district court, perceived harm

> "to be the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention."

Consolidated, 833 F.2d at 68. Applying the above definition, the Court concluded that the damage to plaintiff was "beyond the pale of general harm which reasonably might have been anticipated . . . " *Id.*

[2] In 1984, the vagaries of winds and currents

caused the beaches of Galveston and the surrounding areas to be inundated with crude oil from a cracked tanker hull seventy miles away. The second category of claimants suffered physical damage as a result of third parties "tracking" oil into claimants' businesses and condominiums and onto the personal property therein. "To be found liable, a defendant must have "knowledge of a danger, [the danger is] not merely possible but probable. . . ' "*Id.* (citing *Republic of France v. United States,* 290 F.2d. 395, 401 (5th Cir.1961)). In view of the above interplay of human intervention and Nature's capriciousness, the Court finds as a matter of law that the damages, both physical and economic, resulting from the tracking of oil were not foreseeable. In this instance, the tracking damages were indeed possible, but in no fashion probable. The element of third-party intervention that allowed the oil to be carried from the beaches to the claimants' businesses and condominiums broke the chain of foreseeability. The Court, therefore, modifies its partial summary judgment order of November 29, 1987, so as to DISMISS claimants, not just certain claims, who seek damages for physical and economic damages.[2]

[3] A companion order will be entered dismissing claimants who seek, in addition to tracking damages, recovery for damage to the public beaches such as loss of sand, loss of beach, loss of vegetation and the alleged resultant economic loss. The party to seek damages of this nature is the State of Texas, not private citizens. Furthermore, the Park Board of Trustees of the City of Galveston is REINSTATED in the current cause as a claimant. Prior summary judgment orders entered against, the Park Board

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[2] The Court finds that the damages sought pursuant to theories of Intentional tort and public or private nuisance are simply not sustainable under the pleadings of this case nor under *Testbank. See Tesbank,* 752 F.2d 1019, 1030-31.

are, therefore, VACATED, but only insofar as they affect the Park Board, unless otherwise stated. Finally, claimants who are of the opinion that they do not fall into this second category of claimants shall file individual, specific motions for reconsideration with twenty (20) days of the date of this order.

[4] The direct physical impact of oil on various instrumentalities, e.g. the hulls of boats, was precipaitated without the aid of third-party human intervention but, instead, flowed directly from the M/T ALVENUS via currents and waves. The foreseeability chain, in regard to direct physical impact damages, remains unbroken and petitioners, therefore, liable. Under *Consolidated,* 833 F.2d at 68, the Court finds that both physical and economic damages sustained as a result of the direct physical impact of oil are recoverable. Sea-Arama, Inc., who seeks recovery for costs incurred in the removal of oil from water intake valves and the resultant economic damages, will be allowed to continue as a claimant in the present case. Prior summary judgment orders entered against Sea-Arama are, therefore, VACATED. Such orders are vacated only as to Sea-Arama, Inc., unless otherwise stated. All claimants who have suffered direct physical impact damages, as described above, and have been dismissed in prior summary judgment orders shall file individual, explanatory motions for reconsideration within twenty (20) days of the date of this order.

[5] Claimants' motion for class certification on behalf of James Bates, et, al., fails in several respects. Under Rule 23(a)(1), Fed.R.Civ.P., a class action may be maintained if "the class is so numerous that joinder of all members is impracticable." Since 1984, only six claimants in the class seeking certification, shrimpers in Galvestson, Harris and Chambers County, have come forth. No credible attempt

has been made by movants to demonstrate that the six claimants are representative of a vastly larger "hidden" class of shrimpers who have failed to file actions as claimants. The publicity surrounding the *Alvenus* oil spill and the necessary prerequisites, including repeated notices in local papers, to the petition for limitation of liability would seem to have brought forth those shrimpers who a interested in pursuing their claims. Certification of a class of shrimpers at this late date would in no way advance the litigation of this cause or protect the rights of a possible class. Furthermore, in *Lykes Bros. Steamship Co., Inc., v. Tug Bayou La Fourche,* 1974 A.M.C. 1783, 1786 (S.D.Tex.1974). Judge Singleton found a "class claim" inappropriate and directly contrary to the purpose of a limitation suit. The Court, for these reasons, respectfully DENIES claimants' motion for class certification at this time.

Finally, the Court, on the basis of the record as it currently exists, DENIES petitioners' motion for entry of default judgment against those claimants who have failed to respond to petitioners' interrogatories. Claimants who have failed to respond are, hereby, ORDERED to RESPOND within twenty (20) day s of the date of this order. Failure to respond will, once again, subject these claimants to dismissal.

APPENDIX D
NOS. 88-2515/88-2450

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

IN THE COMPLAINT AND PETITION OF LLOYDS LEASING, LTD., AS OWNER AND CAMMEL LAIRD SHIPBUILDERS, LTD. AND ALVENUS SHIPPING COMPANY, LTD., AS CHARTERS AND OWNERS *PRO HAC VICE* OF THE M/T ALVENUS, HER ENGINES, TACKLES, ETC.

VS.

CONOCO, INC.

Appellees/Third Party
Defendants/Claimants

VS.

WILLIS LUCAS, ET AL

Appellants/Claimants/
Third Party Plaintiffs

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW Appellants and file this Motion for Rehearing directed to this Court's judgment and opinion dated April 4, 1989 and would show as follows:

REHEARING ISSUE 1

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE APPELLEES DID, IN FACT, OWE A DUTY OF DUE CARE TO APPELLANTS AND THEIR PROPERTY IN THIS MASSIVE OIL SPILL DISASTER, THE COURT OF APPEALS APPLYING A NEW AND INCORRECT LEGAL STANDARD TO THIS MATTER.

REHEARING ISSUE 2

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE APPELLANTS' "TRACKING DAMAGE" WAS FORESEEABLE AND APPELLEES' CLAIMED INABILITY TO PREDICT THE EXACT SPOT WHERE THE OIL SPILL WOULD WASH ASHORE DID NOT RENDER THE "TRACKING DAMAGE" UNFORESEEABLE AS A MATTER OF LAW.

REHEARING ISSUE 3

THE COURT OF APPELAS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE COMPLEX CASES INVOLVING MASSIVE OIL SPILLS SHOULD NOT BE DECIDED ON SUMMARY JUDGMENT, OUR SUPREME COURT GENERALLY DIRECTING THAT "ISSUES OF FAR FLUNG IMPORT" SHOULD NOT BE DECIDED ON SUMMARY JUDGMENT AS A MATTER OF "GOOD JUDICIAL ADMINISTRATION".

REHEARING ISSUE 4

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE THIRD PARTY HUMAN INTERVENTION (PEOPLE TRACKING OIL OFF OF BEACHES ADJACENT TO HOMES AND BUSINESSES INTO THOSE HOMES AND BUSINESSES) DID NOT BREAK THE CAUSAL CHAIN OF FORESEEABILITY AS A MATTER OF LAW.

ARGUMENT AND AUTHORITIES

I.

GENERALLY

The panel majority calls for 'far-reaching exoneration of the shipping industry from responsibility" for massive oil spills, [1]in keeping with Judge Gee's concurring *Testbank*[2] opinion, suggesting rules to bar recovery in "disaster" cases.[3] The import of the majority opinion is that anytime an oil tanker owner/operator is unable to predict with exactitude the oil spill's ultimate, precise landfall, oil spill harm is not foreseeable as a matter of law; thus, the tanker owner/operator owes shoreside victims "no duty" and is absolved from liability.[4] The majority's rationale and holding is contrary to settled principles of tort law and Fifth Circuit precedent. Indeed, the majority's new test would exonerate one from shooting a gun into a crowd because it was unpredictable who the bullet would hit.[5] The majority opinion is also contrary to Supreme Court guidance *against* Summary Judgments in complex cases of "far-flung import".

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[1] *Slip. Op.*, at 2714 (Higginbotham, J., concurring and dissenting in part).

[2] *State ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc) (Maj. op. by Higginbotham, J.).

[3] *Id.*, at 1032-33 (Gee, J., concurring).

[4] *Slip Op.*, at 2714.

[5] *Id.*, at 2714.

II.

PROFOUND ISSUES OF PUBLIC IMPORT SHOULD NOT BE DECIDED BY SUMMARY JUDGMENT

The Coast Guard accurately called this a "major" oil spill. (Suppl. Tr. — *Coast Guard Report*, at 2). A major oil spill is a disaster, because so much harm is caused to individuals, businesses, the economy, and the environment. Here, for example, Appellees spilled 2-3 million gallons of oil near the Gulf Coast, causing literally a disaster across a broad sweep of every aspect of life in the affected area.

Where cases involve complex issues of profound public import, our Supreme Court cautions *against* summary disposition. The reason for this salutory caution is clear:

> *(S)ummary Judgment procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import* . . . . We consider it . . . good judicial administration to withhold decision of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.
>
> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be *lacking in the thoroughness* that should precede judgment of this importance and which it is the purpose of the judicial process to provide. (emph. added).

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242 255 (1986) (citing

Silas with approval); *Arenas v. U.S.*, 322 U.S. 419, 434 (1944) ("duty of court . . . can be discharged in a case of this complexity only by trial. . . . ", reversing Summary Judgment).[6]

At bar, *Kennedy's* cautionary principle has not been applied. Instead, the majority decides what everyone agrees was a disaster — on a "treacherous" record composed of affidavit and attorney argument. This was error and not *Kennedy's* good judicial administration".

III.

THE ULTIMATE IRONY

The ultimate irony appears at bar in the distinction between the trial court ruling being appealed and the fulcrum of the majority opinion — a matter no one appealed from.

Tracking Damage	Oil Spill "Bullet" Hits Galveston
Trial Court Not Foreseeable[7]	Foreseeable[8]

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[6]This is also the Fifth Circuit rule. *U.S. v. Fryd Constr. Corp.*, 423 F.2d 980, 984 (5th Cir. 1970); *Heywood v. Pub. Housing Administration*, 238 F.2d 689 698 (5th Cir. 1956):

[7]Order of 1/22/88 at 4:

> "as a matter of law, . . . the damages . . resulting from the *tracking of oil* were not foreseeable. *** The element of third party intervention that allowed the oil to be carried *from the beaches* to claimants' businesses and condominiums broke the chain of foreseeability". (emph. added).

[8]Orders of 1/22/88 and 10/27/88, allowing certain Galveston claimants to recover for physical harm and damage due to oil-laden windblown mist.

Panel Majority Foreseeable[9] Not Foreseeable[10]

The dissent noted the disparity between the decision appealed from and the basis of the majority opinion *(Slip Op.*, at 2713-14).

The gist of the trial court Order appealed from was the precise holding that

> ***The element of *third party human intervention* that allowed the oil to be carried from the beaches to . . . (Appellants') businesses and condominiums *broke the chain of foreseeability.* (emph. added).

Order of 1/22/88, at 4. Clearly, the basis of the trial court's Order was "third party human intervention". Appellants, however, had submitted a hosts of expert affidavits that "tracking damage" (i.e., tracking oil from the beaches to Appellants' homes and businesses) was — indeed — a "common", "very likely" and "highly probable" result of a massive oil spill.[11] The entire panel agrees that this is a "common sense conclusion".[12] Thus, the very *basis* of the

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[9] *Slip. Op.*, at 2713. Judge Higginbotham (concurring and dissenting) also agrees that Appellants' "tracking damage" was foreseeable *(Slip. Op.*, at 2714).

[10] *Slip. Op.*, at 2713.

[11] Tr. 1165-76 (i.e., U.S. Coast Guard Veteran of 20 years experience in oil spill investigation and clean-up, president of oil spill clean-up company involved in over 100 oil spills, college professor training oil spill clean-up personnel for 11 years, etc.).

[12] *Majority*, at 2713; *Dissent*, at 2714.

trial court Order has been burst on appeal[13] and remand should have resulted.

The majority (perhaps in keeping with the *Testbank* concurrence) reached beyond the trial court holding being appealed to produce a far-reaching exoneration of the shipping industry from oil spill liability. Appellants certainly did not appeal the trial court decision that oil on Galveston beaches was foreseeable and Appellees launched no cross-appeal on the matter.

IV.

FORESEEABILITY: THE "CONSOLIDATED" TEST AND THE MAJORITY'S "NEW"ONE

As announced in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987):

> harm . . . (is) . . . foreseeable . . . if (1) harm of a *general* sort (2) to persons of a *general* class (3) *might* have been anticipated by a *reasonably thoughtful* person, (4) as a *probable* result of the act or omission, (5) considering the interpllay of *natural forces* and *likely human intervention.* (numbering and emph. added).

The majority, based on the "general class" of victims element,[14] reasoned that if oil spill landfall at Galveston was not *predicated with certainty,* then harm to the Galveston Appelants was not — as a matter of law —

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[13] *See, e.g., Nunley v. M/V Dauntless,* 727 F.2d 455 (5th Cir. 1984) (*Rest. of Torts2d* §§442, 447); *Watz v. Zapata Offshore Co.,* 431 F.2d 100 (5th Cir. 1970) (adopting *Rest. of Torts2d* §435[i]).

[14] *Slip. Op.,* at 2713.

foreseeable. this "certainty" requirement is *not* the *Consolidated* standard. The new standard deletes *Consolidate's* "general class" element, substituting an onerous "predictable with certainty" element.

Consolidated's "general class"[15] is made up (at bar) by Gulf Coast individuals and businessses. Unlike the majority, *Consolidated* does not require the victims to be identified with exactitude — prior to the oil spill landfall — but only that the "general class" of victims be identifiable. *cf: Testbank, supra* at 1026 (general class of "commercial fishermen were foreseeable, Plaintiffs whose interests . . . (Defendant) had a duty to protect. . . . ").

The majority's new standard reasons that one's harm is not foreseeable as a matter of law — anytime the tortfeasor cannot predict the exact spot where harm would be felt.[16] Under this new standard, a Defendant shooting a gun into a crowd would be absolved from liability because he did not know precisely who the bullet would hit! While such might meet the suggestion in Judge Gee's *Testbank* concurrence, it is not the correct "foreseeability" test.[17]

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[15] It is noteworthy that *Consolidated* dealt with persons and businesses suffering harm up to *6 miles* inland; Appellants at bar suffered harm within *300 yards* inland.

[16] *Slip. Op.*, at 2714.

[17] The panel majority agrees that "Appellee might reasonably anticipate that the oil might wash ashore somewhere. . . " (*Slip. Op.*, at 2713) but concludes that since the precise coastal point to be hit by the oil spill "bullet" was not foreseeable, neither was the harm. (*Id*). Thus, the panel majority reasons that — since Appellees did not precisely know that the oil spill would wash ashore in Galveston— Appellants' harm was not foreseeable and Appellees were absolved of liability.

V.

THE COAST GUARD REPORT: ACCURATE PROJECTIONS NOT IMMEDIATELY AVAILABLE BUT CONCERN FOR GALVESTON RAISED 1 DAY AFTER SPILL

The Coast Guard Report reflects that the computer — generated "modeling and simulation studies" were produced in Seattle, Washington (*Coast Guard Report*, Appendix IIB). The "studies " did *not* include "on scene" observations, and specifically noted that

> (t)o improve the *accuracy* of these trajectory estimates, *on scene* observations . . . *are necessary.* With such date . . . *forecasting procedures could be initiated.* . . . (emph. added).

While accuraate projections were not available (due to lack of computer staff on-site observations),[18] the Coast Guard raised concern for damage to Galveston as early as July 31st — *1 day* after the spill! (*Coast Guard Report*, at 4). On August 1st, the computer staff met with Galveston officials (*Id.* at 5). On August 2nd "boom deployment" at Galveston Bay was planned. *(Id*, at 6) and a formal "alert" issued to Galveston officials (*Id*, at 6-7). The next day — August 3rd — "the (tanker) owners' representatives established a command post . . . in Galveston" and began hiring cleanup crews. (*Id*, at 7) "Over 200 miles of coastline" was at risk (*Id).* That day — August 3rd — oil began to wash ashore in Galveston (*Id*).

Thus, while the majority adopts Appellees' loose reading of a map as the fulcrum for the decision, the Coast Guard was expressing concern for oil spill harm to

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[18] This was remedied by the agreement of the computer staff to come to Texas on August 1st. (*Coast Guard Report*, at 4-5).

Galvesston as early as July 31st — 1 day after the oil spill!

VI.

1-IN-5 PROBABILITY OF HARM IS NOT ENOUGH FORESEEABILITY AS A MATTER OF LAW?

Using Appellees' argument (based loosely on a map), the majority relied on "data" reflecting a 1-in-5 probability of harm to populated Gulf Coast areas like Galvestson.[19] This 20% chance of harm is not enough foreseeability — as a matter of law — under the majority's new test' a 20% chance of harm, thus, presents *no* fact issue to bar Summary Judgment! this new standard is accurately portrayed by the dissent as enough to relieve one of liability for shooting into a crowd, simply because the tortfeasor may not have been exactly sure who the "bullet" would hit.[20] Clearly, the majority's new standard is simply an exoneration of the shipping industry from oil spill responsibility.[21] *cf: Testbank, supra* at 1032-3 (Gee, J., concurring).

WHEREFORE PREMISES CONSIDERED, Appellants pray that Rehearing be granted and, upon such, the April 4th majority opinion be vacated, the trial court judgment be reversed and remanded, costs be assessed against Appellees and for such other and further relief as may be just.

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19 *Slip. Op.*, at 2713 (340 miles of coastline, 60 miles being populated, yields an approximate 1-in-5 probability of oil spill landfall).

20 *Slip. Op.*, at 2714.

21 *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record (counsel list attached) on this 2nd day of May, 1989.

/s/ Otto D. Hewitt, III
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APPENDIX E

"TRACKING DAMAGE" CLAIMANTS

1. Willis Lucas, Individually and d/b/a The Reef Condominium Association.

2. The Commodore Hotel, a partnership.

3. Las Palmas, Inc.

4. Galvestson First Financial Corp. d/b/a Econo Lodge of Galveston.

5. Leisure Services, Inc.

6. Larry L. May d/b/a May's Concessions.

7. Pam Walker, Individually and d/b/a Beach Pocket park #1 Concession, a partnership.

8. Carolyn Johnson, Individually and d/b/a Beach Pocket part #1 Concession, a partnership.

9. Dennis Swearingen, Individually and d/b/a Beach Pocket park #1 Concession, a partnership.

10. GTG/Sanric Galveston Joint Venture d/b/a Ramada Inn.

11. Beryl Ames.

12. Morris L. Bayard.

13. Russell S. and Barbara P. Bentley.

14. William H. Berry.

15. Jane S. Bickel.

16. Margaret P. Buchanan.

17. Richard L. Burleson.

18. Leoncio Z. Campos.

19. Herbert V. Carson, Jr.

20. Douglas H. Cashmore.

21. Fred A. and Iva Cash.

22. Archie T. Chapman.

23. Walter C. Cherry.

24. Thomas J. Couinard.

25. Marion R. Clark.

26. Charles F. Cole.

27. Walter C. Corbin.

28. P. Richard and Carolyn M. Dalton

29. Jerald L. Darnold.

30. Carol L. Davis.

31. David F. Decort.

32. John D. Dedivitis.

33. Melba Joy Derrick.

34. Jack Q. Dunaway.

35. Mitchell Duncan.

36. Roger M. Feig.

37. Anthony and Margaret Filyk.

38. John M. Floyd.

39. Emery and Lillian Fontenot.

40. Stephen Greenberg.

41. Phillip E. Grossman.

42. J. M. Haggard.

43. Garnet M. Heishman.

44. Michael T. Hennings.

45. Mack D. Hickman.

46. Sally A. Hintz.

47. Dennis O. and Diane K. Holiday.

48. Diane M. Hood.

49. Thomas Grant Johnson.

50. Vance Jow.

51. Vic F. Jue.

52. Joseph L. Jurica.

53. Charles R. Kelly.

54. Anthony M. Kindred.

55. Cliff C. and Hazel S. Laborde, Jr.

56. Paul R. Lawrence.

57. Saul G. Levin.

58. Michael A. Levine, M.D.

59. Charles J. Loew.

60. Ronald Eugene Lohec.

61. William S. Magness.

62. Hugh L. Mayo.

63. Luc C. R. Mazzini.

64. Carol McAndrews.

65. Jerry P. and Constance A. Metz.

66. Thelma M. Moore.

67. Delilah J. Morgan.

68. Robert Norris.

69. James K. Owens.

70. Lorraine Panfilli.

71. Archie F. Panfilli, Jr.

72. Mark A. and Karen M. Peterson.

73. Roger and Jill Peterson.

74. Robert J. Phillips.

75. Horacio A. and Carole B. Prado.

76. Tom W. Ritter.

77. John M. T. Rosl.

78. Thomas V. Ryan.

79. Anthony D. Sabino

80. Joseph J. Saia.

81. Bobby S. Sallee.

82. J. H. and Lindsay Samuel.

83. Frank G. Satterfield.

84. Harold H. Schierloh.

85. Donald S. Schiller.

86. Arthur J. Schroeder.

87. Walter A. and Leona F. W. Schroeder.

88. Richard Scobey.

89. Robert R. Scott.

90. Charles E. Shaver.

91. Hasdell Sheinberg.

92. Billy Bob Shiflett.

93. Louis A. Sordahl.

94. Gerald W. Spotts.

95. Dennis S. Stepanik.

96. Stanley R. Strassburg.

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100. R. E. Sullivan, M.D.

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103. Jimmy E. Walters.

104. Douglas Watts.

105. Kenneth W. Westra.

106. Cyril Wolf.

107. David L. Wolf.

108. James A. Woodward.

109. Eugene J. Woznicki.

110. Rajendran and Poh-Chooh Ambiavagar.

111. Hal F. Anders.

112. Ivan Dale Browne.

113. Julian Byrd.

114. C. Ronald Capps.

115. Charter Financial Group.

116. David Cisco.

117. Robert W. Clum.

118. Melvin E. and Mary Cowart.

119. Clark Griswold.

120. Robert A. Gritta.

121. Stephen W. C. Holbrook.

122. Charles Hunsinger.

123. Ralph Douglas James.

124. Leonard Leon.

125. Raymond Ludena.

126. Roy McIntosh.

127. Charles E. Neumann.

128. Hugh E. Parsons.

129. Richard C. Redpath.

130. Ernest Richardson.

131. Raul Rivera.

132. Richard Rothfeld.

133. Walter J. Teachworth, Individually and d/b/a Sherwood Village.

134. Ann Keeling.

135. James Karolik.

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CAUSE NO. 88-2450

IN THE COMPLAINT AND PETITION OF LLOYDS LEASING, LTD., AS OWNER AND CAMMEL LAIRD SHIP-BUILDERS, LTD. AND ALVENUS SHIPPING COMPANY, LTD., AS CHARTERS AND OWNERS *PRO HAC-VICE* OF THE M/T ALVENUS, HER ENGINES, TACKLES, ETC.

Appellees/Petitioners

V.

CONOCO, INC.

Appellees/Third Party
Defendants/Claimants

V.

BOB WHITE, ET AL

Appellants/Claimants/
Third Party Plaintiffs

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, APPELLANTS, BOB WHITE; JAMAICA BEACH IMPROVEMENT COMMITTEE; GEORGE M. WILSON; JOSEPH A. SHAIA; CAPTAIN TOM E. DORAN; WINDSOR T. and HELEN M. ANDERSON; WILLIAM J. HITZHUSEN; MARION TRAVIS and DOLORES ANN PAIR; JERRY KNAUFF; DWIGHT R. BOREL; FRANCIS M. DARR, JR.; GORDON SCHRADER; WILLIAM C. SHADDOCK; ROBERT J. MOORE; JERRY R. SCHRADER;

LAWRENCE R. ELBERT; BRIGGS MOTOR COMPANY; JAMES DAVID BRIGGS AND HUGH ROGERS FERGUSON as Independent executors of the Estate of Luella Grace Briggs, hereinafter Appellants, and files this their Brief in the

NO. 89-327 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, ET AL.,
Petitioners

v.

LLOYD'S LEASING LTD., CAMMELL LAIRD SHIPBUILDERS, LTD. AND ALVENUS SHIPPING CO. LTD.,
Respondents

v.

CONOCO, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2200

QUESTIONS PRESENTED

Simply put, two grounds for certiorari are presented in the Petition. First, whether the decision below conflicts with this Court's opinions in *Kennedy v. Silas Mason,* 334 U.S. 249 (1948); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); and *Arenas v. United States,* 322 U.S. 419 (1944). Second, whether the United States Court of Appeals for the Fifth Circuit's decision conflicts with *Union Oil Company v. Oppen,* 501 F.2d 558 (9th Cir. 1974) and with other Fifth Circuit decisions. For the reasons stated below, it is clear that both of these questions should be answered in the negative, and the Petition for a Discretionary Writ of Certiorari should be denied since no important or special issues are presented.

RULE 28.1 LIST OF PARTIES

In addition to the Petitioners, the following companies are listed in compliance with this Court's Rule 28.1:

Alva Shipping (Holding) Ltd., U.K.

Alvenus Shipping Company Ltd.

Lloyd's Leasing Ltd.

Lloyd's Banking Group, P.L.C.

Cammell Laird Shipbuilders, Ltd.

Vickers Ship Building & Engineering Ltd.

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NO. 89-327

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v.

CONOCO, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices Of The Supreme Court of The United States:

Lloyd's Leasing Ltd., Cammell Laird Shipbuilders, Ltd. and Alvenus Shipping Co., Ltd., Respondents in this appeal, file this Brief in Opposition to the Petition for Writ of Certiorari filed by Willis Lucas, et al., and show as follows:

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly affirmed a judgment of the United States District Court for the Southern District of Texas, Galveston Division, granting Summary Judgment in favor of Respondents since the alleged harm suffered by the Petitioners was not foreseeable. The Petitioners seek review of the Fifth Circuit's judgment. The Fifth Circuit Opinion is reported at 868 F.2d 1447 and the January 22, 1988, Memorandum and Order of the District Court is reported at 697 F. Supp. 289. Copies of both Opinions are attached as Exhibits "A" and "C", respectively, to the Petition for Writ of Certiorari. The Fifth Circuit properly denied a Motion for Rehearing and Motion for Rehearing *En Banc* on May 19, 1989, and the Petition for Writ of Certiorari ensued.

JURISDICTION

Jurisdiction of this Court has been properly invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Statement of Facts

On July 30, 1984, the M/V ALVENUS grounded in the Calcasieu River Bar Channel approximately eleven nautical miles south-southeast of Cameron, Louisiana. As a result of the grounding, approximately 65,500 barrels of crude oil spilled into the waters of the Gulf of Mexico. Despite prompt containment measures the vagaries of the wind and current drove the slick over 70 miles west from the site of the grounding, and three to four days later, between August 3 and 4, 1984, the

rough seas and winds forced oil onto beaches at the west end of Galveston Island. Crews employed by Respondents herein immediately commenced cleaning oil from the beaches. During the next two weeks more oil was washed ashore.

Despite prompt and thorough cleaning of the area, a short-term general economic dislocation resulted from the oil spill. Petitioners are a discrete class of claimants who suffered minimal physical damage as a result of the spill. Petitioners are homeowners and commercial property owners situated at varying distances from Galveston Island beaches. Their physical damage resulted from oil being tracked by unknown third parties onto Petitioners' property and *not* by direct physical impact of the oil.

B. Course of proceedings and disposition in the two Courts below

This action was commenced by the filing of a Petition For Limitation of Liability pursuant to 46 U.S.C. § 180 *et seq.* Petitioners (Respondents herein) filed a Motion For Summary Judgment and on January 22, 1988, the district court ruled that those claimants who suffered economic loss exclusive of physical damage were precluded from seeking recovery of their economic damages. The district court ruled that those claimants alleging "tracking" damages and resulting economic losses were barred from recovery by traditional tort principles, as applied in admiralty, because the alleged physical damages, and the resulting economic damages, were not foreseeable as a matter of law.[1] This latter issue is the only issue which is before this Court.

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1. 697 F. Supp. at 291.

The order of the district court was appealed to the Fifth Circuit and on April 4, 1989, the Fifth Circuit affirmed the judgment of the district court.[2] The Court of Appeals clearly set out the issues before it. The issues were whether foreseeability is a quetsion of fact and should be decided as a matter of law and, second, whether Summary Judgment is appropriate. The Court of Appeals correctly held that Summary Judgment is appropriate under the circumstances of this case, correctly applied this Court's recent holdings with respect to summary judgment, and, based on the unique facts of this case, held damages suffered by Petitioners herein were unforeseeable as a matter of law.

ARGUMENT

Petitioners ask this Court to grant the Writ of Certiorari due to a purported conflict with prior decisions of this Court or a purported conflict between the Courts of Appeals. Furthermore, Petitioners make numerous "policy" arguments that the district court and the Fifth Circuit made improper factual findings. The latter arguments clearly are not a basis for the granting of a Writ of Certiorari under the time honored two-court rule[3] and because these issues were properly resolved below. As further elaborated below, Petitioners have failed to

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2. In their Petition For Writ of Certiorari, Petitioners incorrectly state that the Fifth Circuit reversed the trial court's holding but affirmed summary judgment. A reading of the Fifth Circuit and district court's opinions indicates that the district court's holding that the "tracking" damages were unforeseeable was affirmed by the Fifth Circuit.

3. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-8 n.5 (1985); *National Collegate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984).

satisfy the requirements for review on certiorari and no extraordinary policy reasons exist in the circumstances of this case for the granting of the Writ by this Court.[4]

A. There is no conflict with the decisions of this Court.

Petitioners contend that the decision of the Fifth Circuit conflicts with this Court's Opinion in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Arenas v. United States*, 322 U.S. 419 (1944). This is far from the case and, as discussed below, the opinion below does not conflict with this Court's decisions.

Petitioners cite *Kennedy v. Silas Mason Co.*, for the proposition that complicated cases involving profound public issues merit special treatment and since the case at bar is complicated, Summary Judgment was improper.[5] *Kennedy* involved a wartime action brought under the Fair Labor Standards Act by workers in an ammunition plant for overtime pay. This Court noted that "we have

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4. Petitioners make an argument that grave public policy considerations are involved in this case. This is far from the case since, as elaborated in the counter statement of the case, *supra*, this case involves alleged damage from a routine oil spill. Certainly, grave political or social questions are not involved in this case which might prompt this Court to grant a Writ of Certiorari. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (prompt disposition of claims brought by U.S. citizens against government of Iran); *United States v. Nixon*, 418 U.S. 683, 686-7 (1974) (review before judgment granted "because of the public importance of issues presented and need for their prompt resolution."); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) (validity of contempt adjudications growing out of government seizure of coal mines).

5. This Court has found Summary Judgment proper in extraordinarily complex cases. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees . . . and ultimately affecting by a vast sum the cost of fighting the war."[6] In *Kennedy,* this Court noted that affidavits and attached exhibits alone provided an insufficient record on which Summary Judgment may be granted, but held that the district court did not lack the power or justification for applying Summary Judgment procedures. This Court overruled *Kennedy, sub silentio,* in *Celotex Corp. v. Catrett,*[7] and by the 1963 amendments to Rule 56(e) of the Federal Rules of Civil Procedure.

As this Court noted in *Celotex,* the plain language of Rule 56(c) mandates the entry of Summary Judgment, after adequate time for discovery, and upon Motion, against a party that fails to make a showing sufficient to establish the existence of an element essential to that party's cause of action, and on which the party will bear the burden of proof at trial.[8] Where the non-moving party bears the burden of proof at trial, Summary Judgment may be made solely on the pleadings, depositions, interrogatory answers and admissions on file.[9] Rule 56 requires the non-moving party to go beyond the pleadings and his own affidavits to designate specific facts showing genuine issues for trial.[10] Claimants have failed to estab-

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6. 334 U.S. at 256.

7. 477 U.S. 317 (1986).

8. 477 U.S. at 323-24.

9. 477 U.S. at 324.

10. *Id.* Thus, the courts below properly held that the affidavit in question was insufficient to overcome the Motion for Summary Judgment filed by respondents herein.

lish the existence of an essential element on which they bear the burden of proof, the foreseeability of harm, and the Fifth Circuit was correct in applying this Court's Summary Judgment standard.[11]

This Court held in *Anderson v. Liberty Lobby* that Rule 56(c) requires that the district court enter Summary Judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor.[12] And, when the moving party has carried his burden under Rule 56(c) his opponent must present more than a metaphysical doubt about the material facts.[13]

This Court's standard was properly followed by the Fifth Circuit. Petitioners had the burden of proof to show that the harm they suffered was foreseeable.[14] Petitioners failed to establish the existence of this essential element of their case and, as this Court has noted, a complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact.[15] Respondents recognize that this

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11. Petitioners contention that *Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913) is to the contrary is incorrect. *Gillespie* was an appeal from the Supreme Court of the Territory of Arizona. Justice Lurton only held that a downstream riparian owner could obtain an injunction to enjoin pollution of a public stream. The question of foreseeability of harm was not the issue before this Court. Also, upstream pollution in a river causing damage is clearly more foreseeable than oil washing ashore 70 miles from a spill in the Gulf of Mexico and then being tracked by unknown third-parties on to Petitioners' property. Also, Petitioners are not riparian owners of the Gulf of Mexico.

12. 477 U.S. 242, 250 (1986).

13. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

14. As this Court noted in *Dalehite v. United States*, 346 U.S. 15, 42 (1953), a danger must be probable, not merely possible.

15. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Court suggests lower courts act with caution in granting Summary Judgment and deny Summary Judgment where the better course is to proceed to a full trial.[16] However, in the case before the Court, proceeding to a full trial would be futile since Petitioner's have failed to designate specific facts to overcome a directed verdict or Summary Judgment and the courts below have exercised the requisite caution.[17] Thus, since the courts below properly followed this Court's mandate in *Celotex* and *Anderson v. Liberty Lobby,* no conflict with these opinions exists and the Petition for a Writ of Certiorari should be denied.

Petitioners also argue that the decision below conflicts with this Court's holding in *Arenas v. United States.*[18] That case has absolutely no application to the case currently before the Court. In *Arenas* an Indian sued to be awarded a trust patent to certain lands on an Indian reservation. The *Arenas* district court had granted Summary Judgment dismissing the suit and the district court was affirmed by the Court of Appeals for the Ninth Circuit. This Court reversed a finding that the Petitioner (Mr. Arenas, the Plaintiff below) properly stated a claim upon which relief can be granted and that he was entitled to a trial. Petitioners in the case currently before this Court deceptively cite *Arenas* without noting that the issue regarding whether proper Summary Judgment evidence was adduced was not even presented to this Court in *Arenas.*[19]

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16. *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986), *citing, Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948).

17. The Summary Judgment standard mirrors the directed verdict standard. *Anderson,* 477 U.S. at 250.

18. 322 U.S. 419 (1944).

19. The issue was not raised below. *See* 137 F.2d 199 (9th Cir. 1943). Petitioners cite *Arenas* for the proposition that a complex

The decision below does not conflict with the standard for granting Summary Judgments in prior opinions of this Court. The Petition for a Writ of Certiorari should be denied.

B. The decision of the Fifth Circuit is not contrary to decisions rendered by other circuit courts.

Contrary to Petitioners' contentions, the Fifth Circuit's decision in this case does not conflict with the Court of Appeals for the Ninth Circuit's opinion in *Union Oil Co. v. Oppen.*[20]

The issues determined by the Fifth Circuit were whether foreseeability is properly decided on a Motion for Summary Judgment and whether the alleged damage suffered by Petitioner falls within the Fifth Circuit's definition of foreseeability.[21] The issue below is not whether parties can recover for economic losses absent physical injury to a proprietary interest.[22]

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case can be disposed of only by trial. This proposition was rejected by this Court in *Celotex* where it was held that irrespective of the complexity of a case Summary Judgment is mandated by Federal Rule of Civil Procedure 56(c) where a party fails to establish the existence of an element essential to his case on which he bears the burden of proof. 477 U.S. at 322-23. Respondents also note that this Court found Summary Judgments are proper in complex cases. *See, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

20. 501 F.2d 558 (9th Cir. 1974).

21. 868 F.2d at 1449.

22. The issue was decided by the Fifth Circuit in *State of Louisiana Ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986). In that case, the Court of Appeals properly followed the direction of this Court in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303 (1927). The issue regarding whether *Robins Drydock* was properly decided is not before this Court today. Also, an arguable conflict

Union Oil Co. v. Oppen does not conflict with the decision below. *Union Oil* dealt with a claim by fishermen for damages sustained as a result of the 1969 Santa Barbara oil spill. The Court of Appeals for the Ninth Circuit, in affirming the district court's denial of defendants' motion for partial summary judgment, held that under California or maritime law[23] fishermen were allowed to recover for pure economic loss. Thus, the issue before the *Oppen* court was not foreseeability of damage as a result of an oil spill but was whether a special exception should be made for commercial fishermen to the general rule that no cause of action lies against a defendant whose negligence prevents the Plaintiff from obtaining a prospective pecuniary advantage.[24] The Court of Appeals for the Ninth Circuit held that commercial fishermen may recover their economic losses caused by the oil spill of January 28, 1969.[25] Therefore, since the issues in the case currently

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between the Courts of Appeals regarding the now well established rule in the Fifth Circuit that prohibits recovery for economic loss absent physical injury to property in which Plaintiff holds a proprietary interest is not an issue in the case currently before this Court because it played no part in the *per curiam* decision of the Fifth Circuit in its Opinion below.

23. *Union Oil v. Oppen* arose as a claim under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* Pursuant to that statute state law is adopted as surrogate federal law. *See* 43 U.S.C. § 1333(a)(2).

24. The court found an exception in this particular case holding that a special relationship between commercial fishermen and oil companies appears to exist. *See* 501 F.2d at 565-571.

25. The court also notes that "nothing said in this Opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrence of 1969 constitutes a legally cognizable injury for which Defendants may be responsible." 501 F.2d at 570. Thus, Petitioners in the case currently before the Court would not even be allowed to recover, as a matter of law, under *Oppen*. No

before this Court, whether the Fifth Circuit properly decided a question of foreseeability by Motions for Summary Judgment, was not even presented to the court in *Oppen* no conflict exists.[26]

It also should be noted that the Court of Appeals for the Ninth Circuit, in decisions with respect to the foreseeability issue presented below, is in absolute agreement with the Court of Appeals for the Fifth Circuit as well as other Courts of Appeals.[27] In other words, there is no

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conflict between the Courts of Appeals exists since under either scenario—foreseeability or California law regarding recovery for pure economic harm—Claimants would be denied recovery.

26. The court in *Oppen* does note that the presence of duty on the part of defendants (the oil company) would turn substantially on foreseeability and that a question for the trial court was whether defendants could reasonably have foreseen that negligently conducted drilling operations might diminish business opportunities of commercial fishermen. 501 F.2d at 569. Diminishment of aquatic life could be a foreseeable consequence of a substantial oil spill. The Court of Appeals for the Ninth Circuit is merely restating generally accepted tort principles. *See, e.g., Morris on Torts,* p. 44 (2d Ed.).

These facts are clearly distinguishable from the case currently before this Court since the damage which Petitioners claim was foreseeable here is whether people walking on a beach damaged by an oil spill would get oil residue on their shoes, walk into Petitioners' homes and businesses and because these people with oil on their shoes were not careful, certain small amounts of oil were tracked onto the carpet or floor of Petitioners. It must be noted that Petitioners in this case are not the owners of the beach or owners of property that suffered direct harm as a result of the oil spill. Rather, these are persons who suffered harm as the result of third-parties who tracked oil onto their property. As the district court properly pointed out, the element of third-party intervention from the beaches to claimants businesses and condominiums broke the chain of foreseeability. 697 F. Supp. at 291. The claimants in this case are not commercial fishermen who claimed a diminishment in shrimp or fish business as the result of the oil spill.

27. *See, e.g., Weyerhaeuser Co. v. Atropos Island,* 777 F.2d 1344, 1351-2 (9th Cir. 1985) (Defendant should not be liable for damages that bear only a tenuous causal relation to Defendant's negligence, therefore, based on the facts in the case harm was deemed unfore-

conflict between the Courts of Appeals regarding the issue before the Court today.[28]

Finally, Petitioners argue that because the decision below is in conflict with prior holdings of the United States Court of Appeals for the Fifth Circuit, a Writ of Certiorari should be granted. A Writ of Certiorari is not proper to resolve a difference between two panels of the same Court of Appeals. Rehearing *En Banc* is the proper remedy. Rehearing *En Banc* was properly denied in this case because there is no conflict between the decision below and prior decisions of the United States Court of Appeals for the Fifth Circuit with respect to the summary judgment on foreseeability.[29]

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seeable). *See also, Alaska Freight Lines v. Harry,* 220 F.2d 272 (9th Cir. 1955) (under California law, foreseeability essential element of negligence action). Likewise, both this Court and the Courts of Appeals have found that for a Defendant to be liable shipowner must reasonably have foreseen harm done. *Dalehite v. United States,* 346 U.S. 15, 432 (1953) (danger must be probable, not merely possible); *Consolidated Aluminum Corporation v. C.F. Bean Corporation,* 833 F.2d 65 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 2821 (1988); *Republic of France v. United States,* 290 F.2d 395 (5th Cir. 1961), *cert. denied,* 369 U.S. 804 (1962); *Petition of Kinsman Transit Company* (*Kinsman I*) 338 F.2d 708 (2nd Cir. 1964), *cert. denied,* 380 U.S. 904 (1965).

28. Likewise there is no conflict with the Court of Appeals for the Seventh Circuit's suggestion that admiralty courts should be less ready to find a subsequent wrongful act by a party who breaches the chain of causation. *Commercial Transport Corp. v. Martin Oil Service, Inc.,* 374 F.2d 813, 817 (7th Cir. 1967), *citing,* Gilmore and Black, *The Law of Admiralty* (1957), p. 404. In *Martin Oil,* the court was referring to the fact that contributory negligence was not a bar to recovery in an admiralty action while in 1967 it was a bar to recovery in shore courts. Thus, admiralty courts were less reluctant to find contributory negligence. This is not the situation in the case before this Court today.

29. In fact, the Fifth Circuit has held that summary judgment is proper on the question of foreseeability in a negligence cause of action. *Karpovs v. State of Mississippi,* 663 F.2d 640, 649 (5th Cir.

C. No constitutional question is presented.

The opinion below does not find that any statute of the United States is unconstitutional and Petitioners do not make such an allegation. Therefore, the third general reason for granting a Writ of Certiorari is not present in the case before the Court.

CONCLUSION

The case before the Court does not present special and important matters for certiorari. As noted above, the granting of Summary Judgment was properly resolved by the Court of Appeals in accord with this Court's recent triumvirate of cases dealing with summary judgment.[30] There is no conflict between the Courts of Appeals either on the question of whether summary judgment is proper or regarding the proper standard for determining fore-

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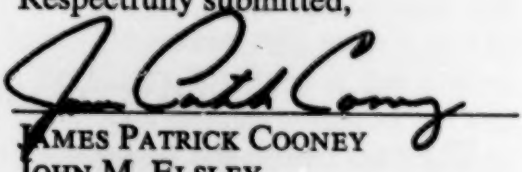
1981). Furthermore, Petitioners contend that the decision below conflicts with the doctrine of foreseeability as applied in *State of Louisiana Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1986) (*en banc*). It doesn't because the issue before the Court in *TESTBANK* was whether physical damage was required to recover for economic injury and not whether summary judgment was proper on the question of foreseeability. Likewise, the issue before the court in *Consolidated Aluminum Corporation v. C.F. Bean Corporation*, 833 F.2d 65 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988) was whether the trial court's ruling was proper in a bench trial that damages suffered by Consolidated were not foreseeable. The Fifth Circuit held that the Court properly determined that damages suffered were not foreseeable and not within the reach of duty imposed on Bean to perform its dredging operations. *Id.* at 68. There is no conflict between the decision below and other Fifth Circuit cases.

30. *Matsushita Electric Industrial Company Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

seeability in a maritime limitation of liability case. Finally, no constitutional question is presented.[31] Accordingly, Respondents respectfully submit that the Discretionary Petition For Writ of Certiorari must be denied.

Respectfully submitted,

By: 

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31. There is also no great public policy issue in this case. As noted in footnote 4 *supra*, Petitioners apparently wish this Court to grant a Writ of Certiorari to re-examine the facts in this case.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Opposition To Petition For Writ of Certiorari on the following named counsel by placing the same in the United States mail, *Certified Mail, Return Receipt Requested*, in a properly addressed package with adequate postage this 17 day of October 1989:

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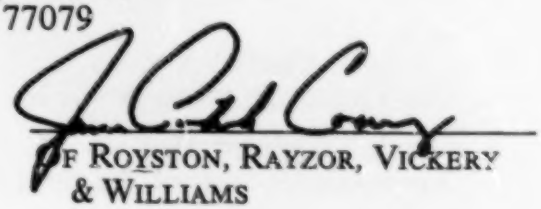

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS

No. 89-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, *et al*

Petitioners,

VS.

LLOYD'S LEASING, *et al*

Respondents.

VS.

CONOCO INC.

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONOCO INC.'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied existing federal rules and maritime law in this case.
2. Whether there is present in this case any significant question for review by this Court.

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CONOCO INC.'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of the case fails to present a number of key points which were central to the consideration by the district court and the Fifth Circuit.

It is not disputed that the M/T ALVENUS suffered a hull collapse on July 30, 1984, about 11 miles offshore of the entrance to the Calcasieu River, which leads to the port of Lake Charles. Approximately 65,500 barrels of Venezuelan crude oil escaped into the sea, of which an undetermined portion subsequently washed ashore some days later on an

area of beach extending from Rollover Pass, about 15 miles east of Galveston, to the west end of Galveston Island, about 25 miles from Galveston proper.

The owners of the M/T ALVENUS, Lloyd's Leasing, *et al*, subsequently filed a limitation action in Galveston, in which all concerned filed claims for damages of various sorts. There were a number of cross claims and third-party claims, which are not pertinent to the Petition for Certiorari before this Court.[1]

One group of claimants, who are now Petitioners for certiorari in this matter, alleged damage which resulted from oil being tracked from the beach on the feet of individuals into, primarily, places of business and public accommodation, but also homes and other locations. This tracked-in oil was made the basis for claims for physical damage, which the responses to interrogatories indicated were relatively miniscule. These claims were accompanied, however, by very much larger claims, in some cases enormous, for economic damages of various sorts, allegedly for either loss of revenue from the absence of visitors to Galveston during the period, loss of rentals because visitors to Galveston were deterred by publicity, loss of enjoyment of beachhouses, and in some cases, loss of sales opportunities of real property. Leaving aside the question of whether or not these claims should have more correctly been associated with the downturn in the Texas economy, which was in full swing in the summer of 1984, it was clear that they were not the direct result of the relatively minor physical damage. It was evident that these claimants were in hopes that the relatively minor physical damage to their premises would serve as a vehicle for the recovery of generalized economic damages of all kinds. Under the leading decision of the Fifth Circuit in *TEST-BANK*[2], which required physical damage to a proprietary

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[1] Conoco was the owner of the cargo and the voyage charterer of the ALVENUS. Claims were made by Conoco as owner of the cargo, and against Conoco by Lloyd's Leasing, *et al*, under the charter party, as well as by some of the other claimants under various theories.

[2] *State of Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

interest before consequential damages could be recovered, they had no recovery without physical damage.

A motion for summary judgment was filed against these "tracking" claimants, among others, by Lloyd's Leasing, *et al,* and was supported by Conoco. The district court was confronted with a situation in which the potential number of claimants, and the area in which they might be located, were both entirely open-ended, because there were obviously people outside the immediate area of Galveston who had been damaged similarly by oil tracked off the beaches into automobiles, and thereafter into locations visited by the drivers of the automobiles, which could have been far afield. The district court granted summary judgment with respect to the "tracking" claimants, and subsequently denied two motions for reconsideration which raised nothing new. In denying the second motion, the court indicated orally that there was no intent to reconsider, and that any further interlocutory requests would be better directed to the Fifth Circuit. This was the "order" referred to by Petitioners.[3] The district court never indicated any doubt, contrary to Petitioners' allegations both here and below.

The Fifth Circuit pointed out that the district court order was not appealable under 28 U.S.C. 1292(b), but was appealable as an interlocutory decree in admiralty, under 28 U.S.C. 1292(a)(3), and heard the appeal. Subsequently, the Fifth Circuit affirmed the decision of the district court. It is quite incorrect to state, as do Petitioners, that the Fifth Circuit reversed the trial court's holding. There is no such indication in the opinion; indeed, the Fifth Circuit discussed the holding of the district court that the damage to Petitioners was not foreseeable at some length, and stated their agreement with the conclusion of the district court.[4]

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[3] Petition, p. 3.

[4] *Lloyd's Leasing Ltd. v. Conoco Inc. v. Bob White et al,* 868 F.2d 1447 at 1449 (5th Cir. 1989); Petition, p. A-4 to A-6.

SUMMARY OF REASONS FOR DENYING THE WRIT

Both the district court and the court of appeals reached decisions which were entirely principled, which accurately applied available precedent, and which were fully in accordance with modern principles of tort law and with the guidance of this Court applicable to tort cases involving damage to property. As is set forth in more detail below, Petitioners' contrary arguments are unfounded.

In reaching their decisions, the district court and the Fifth Circuit correctly applied the guidance of this Court with respect to Rule 56 of the Federal Rules of Civil Procedure governing summary judgments.

The issues in this matter are, contrary to the arguments of Petitioners, straightforward and involve a decision with regard to a specific group of claimants, distinguishable on narrow factual grounds from other parties to the suit. No broad issue of public policy, no constitutional issue, no issue of federalism, no issue of uniformity of maritime law, no issue of conflict between the circuits, and, indeed, no issue justifying review by this court, is presented.

ARGUMENT

I.

The District Court correctly followed the guidance of this Court on summary judgments, present day principles of tort law, and Fifth Circuit precedent in its January 22 Order.

The district court was confronted with a situation in which, as mentioned before, there was no rational geographic limitation which could be applied to set a limit on the "tracking" claimants to be included in the action. The geographic limits of impact were completely open-ended, since no one had any idea how much oil from the Galveston Island beaches had wound up on the feet of people who subsequently tracked it into their automobiles and then drove to parts unknown. The quantum of damages of people in

inland cities in Texas or elsewhere might be less than that of a motel owner on the Galveston waterfront, but quantum did not offer a rational or principled basis for determining the existence of a cause of action. Neither was there any rational limit in time, because studies of oil spills tell us that some oil from past spills, which apparently becomes buried in the sand in the surf zone along beaches, can appear on the beaches months and even years later. This oil could be tracked like any other. The district court was mindful of the *en banc* opinion of the Fifth Circuit in *TESTBANK*[5], which held that, in mass pollution cases such as was presented, a "bright-line" approach was to be preferred over case-by-case resolution because it made for more objective and principled decision, as well as making resolution simpler and cheaper. This question had been very clearly presented in *TESTBANK*, and the majority's preference for the "bright-line" approach which could be applied simply, and in future cases, was quite clear in the opinion.[6] *TESTBANK* itself was a "pragmatic limitation on the tort doctrine of foreseeability".[7]

TESTBANK, however, did not appear to be the answer. At the time the district court considered the present case, there was no guidance available as to whether a nexus between physical damage to proprietary interests and consequential damages was required for recovery. While it seemed logical, and the district court had implied that it so interpreted the opinion, the opinion did not say so. Therefore, on the face of the question, the *TESTBANK* limitation on the scope of liability appeared not applicable because there was physical damage, although *de miminis*, to a proprietary interest.

In such circumstances, there was guidance available to the district court in another recent Fifth Circuit case, *Consolidated Aluminum*.[8] This involved a situation where there was physical damage to an aluminum plant resulting from an interruption to gas supplies brought about by damage

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[5] 752 F.2d 1019. See note 2, *supra* for full citation.

[6] 752 F.2d 1019 at 1029.

[7] 752 F.2d 1019 at 1023.

[8] *Consolidated Aluminum v. C. F. Bean*, 772 F.2d 1217 (5th Cir. 1985); 639 F. Supp. 1173 (W.D. La. 1986); 833 F.2d 65 (5th Cir. 1987).

to a pipeline by a dredge. The first Fifth Circuit opinion in that case held that *TESTBANK* was inapplicable because the consequential damages resulted from the physical damage to the aluminum plant, and *not* the damage to the pipeline.[9] They remanded a grant of summary judgment on behalf of the dredge owner, Bean, to the Louisiana district court, with instructions to analyze the case on the basis of traditional admiralty tort principles of foreseeability, to determine whether Bean had any duty to Consolidated.[10] The district court, acting in accordance with the general philosophy of the Fifth Circuit in matters of property damage, the principles of *TESTBANK*, and with due consideration of the problems which would be generated by an effort to set any rational geographic limitation on which of the pipeline customers could recover, selected a rule which would allow recovery for the damage to the pipeline itself, and for damage directly caused by the escape of gas, but excluded damages, physical or otherwise, for those whose only contact with the accident was as a customer of the pipeline.

The Fifth Circuit affirmed, in an opinion containing a considerable discussion of general tort law rationale supporting the conclusion of the district court.[11]

In the case now before this Court, the Texas district court also needed to consider the clear guidance of the Fifth Circuit in property damage tort cases, such as *TESTBANK* and *Consolidated*, and numerous others, towards limiting the extent of liability, rather than adopting the more expansive approach applied by many courts in matters involving personal injury and products liability, and to a lesser extent in liability for ultra hazardous activities. In matters of property damage, the recent and rather restrictive decision of this Court in *East River Steamship*[12] was important. It is not necessary to burden this brief with a prolonged discussion of

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[9] Thereby at least implying that there *was* a nexus requirement in *TESTBANK*.

[10] 772 F.2d 1217 at 1218 n. 2 and 1224.

[11] 833 F.2d 65 at 67; 639 F. Supp. 1179 (W.D. La. 1986).

[12] *East River Steamship Corp. v. Transamerica DeLaval, Inc.*, 476 U.S. 858 (1986); See also, generally, R. Force, *Marine Products Liability in the U.S.*, XI Mar. Law. 1 (1987).

the basic dichotomy between the two approaches to tort liability, which a recent edition of a treatise[13] requires over 40 pages to outline. It is sufficient to state that the guidance of this Court and the Fifth Circuit in matters of property damage is toward the less expansive view of the majority opinion in *Palsgraf*,[14] which said that negligence was a matter of relation between the parties, which must be founded on the foreseeability of harm to the person.

The district court in the present case, seeking an easily applied general rule, concluded that, while physical damage to things like the hulls of boats or piers ashore which encountered the oil, was foreseeable, "tracking" damage was not. Summary judgment on behalf of Lloyd's Leasing, Inc. was granted.[15]

II.

The Fifth Circuit correctly followed its own precedents, the guidance of this Court with respect to summary judgment and tort law in reaching its decision.

The action of the Fifth Circuit is of considerable interest.[16] To begin with, contrary to the impression created by Petitioners, it is clearly apparent that there was no disagreement whatever on the basic decision, which was that the tracking damage claimants should not have a cause of action for consequential damages because it was contrary to the views of the Fifth Circuit as set forth most recently in both *TESTBANK* and *Consolidated*.[17] The only disagreement was on the exact analysis.

The majority agreed with the district court's view that *TESTBANK* was not applicable, and with that court's applica-

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[13] *Prosser and Keeton on Law of Torts* (5th Ed. 1984.)

[14] *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

[15] Summary judgment standards, as set by this Court, are discussed at the beginning of Section III, *infra*, since they apply to both opinions below.

[16] *Lloyd's Leasing v. Conoco v. Bob White, et al*, 868 F.2d 1447 (5th Cir. 1989).

[17] Notes 2 and 8, *supra*.

tion of *Consolidated,* and the foreseeability analysis. They concluded that the appellees had no duty to those who suffered "tracking damages". On the particular facts present, as to the appellees, these particular claimants, not directly exposed to the oil, fell outside the limits laid down in *Consolidated.* "... [T]he district court's determination that the harm suffered by the plaintiffs was not foreseeable and that the appellees therefore owed no duty to the appellants is correct."[18] The majority added to the rationale of the district court, which they had stated was correct, the additional factor that the shores of the western Gulf of Mexico were sufficiently undeveloped so that it was not reasonably foreseeable that oil would come ashore in such a densely populated location that the risk of people tracking it off the beach was reasonably foreseeable.[19]

Judge Higginbotham, who was the author of the *en banc* opinion in *TESTBANK,* preferred a different approach. He concluded that the majority's approach to foreseeability was somewhat strained. As the author of the *TESTBANK* opinion, and doubtless with the implication of *Consolidated* in mind,[20] he evidently felt free to put a gloss on *TESTBANK,* making clear that a direct nexus *was* required between consequential damages and the physical damages to a proprietary interest to permit a recovery. In other words, he made clear what had been only implicit before, which was that the only consequential damages recoverable under *TESTBANK* were those which resulted directly from the physical damage itself.[21] It seems reasonable that the author of an *en banc* opinion should be accorded more than ordinary deference as an interpreter of that opinion. Judge Higginbotham would have held that, while the tracking damage claimants should have been allowed a cause of action for their physical damages only, they had no cause of action for economic damages which did not arise directly from those physical damages. In briefing, it had been argued by both Lloyd's Leasing and

[18] 868 F.2d 1447 at 1449.
[19] *Id.*
[20] *See* notes 8 and 9, *supra.*
[21] 868 F.2d 1447 at 1451.

Conoco that such a nexus was implicit in *TESTBANK* and had been recognized by the district court. It was a coincidence that the matter fell to a panel which included Judge Higginbotham. Petitioners argue at great length in various places in their petition that Judge Higginbotham's opinion is truly in disagreement with the majority. So to argue ignores what the entire panel clearly saw as the central issue in the case. Indeed, Judge Higginbotham's opinion clearly recognizes this:

> The majority understandably balks at the claims of businesses who point to the tracking of oil. I would find the answer in *TESTBANK*, rather than in a forced reading of foreseeability, for the reasons we there explained. Our insistence upon physical injury to a proprietary interest was *a forthright pragmatic limit on the doctrine of foreseeability.* Undoubtedly, many persons suffered some foreseeable physical loss and yet were not allowed to recover general economic losses. These physical losses were not a direct consequence of the collision and spill, but were the secondary consequences of shipping delays.[22]

He then went on to state that:

> *TESTBANK* limits which parties can recover for foreseeable injuries. In this appeal, the claimants' only physical injury is two parties removed from the most immediate *TESTBANK* plaintiff, the owner of the affected shore property. . . .
>
> I would hold that these claimants cannot recover general economic losses attributed to the general loss of custom attending the spill because they have no physical injury within the meaning of *TESTBANK*.[23]

Judge Higginbotham would have allowed a cause of action only for "losses attributable to actual physical injury and any losses which *that* physical injury causes."[24] It was abundantly clear from the record before the Fifth Circuit and the pleadings submitted by Petitioners, claimants below, that

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[22] 868 F.2d 1447 at 1450-1. (Emphasis supplied.)

[23] 868 F.2d at 1451.

[24] 868 F.2d at 1451, emphasis in original.

what was sought was a recovery on a broad basis for all possible economic consequences in any way related to the oil spill. To argue that there was real disagreement on the panel of the Fifth Circuit, and to take Judge Higginbotham's remarks about foreseeability out of context, as do Petitioners, is simply to ignore the focus of the panel on the fundamental issue.

III.

The other arguments of Petitioners are without foundation.

The Petitioners additionally argue that the grant of summary judgment in this matter was contrary to the guidance of this Court as to matters appropriate for summary judgment. In the first place, the case is by no means complicated so far as regards the "tracking" claimants. Either they have a cause of action for their claims or they do not. Any complications in the case do not arise from the fact of the spilled oil, from which the claims of Petitioners arise. Rather, they involve the dispute between the shipowners, clearly liable in the first instance, and various other parties whom the shipowners, and some others, allege may have had something to do with causing the oil spill. The rather complex question of distribution of liability amongst these parties is a matter of indifference to the Petitioners, as long as there is at the end of the day a solvent liable party.

Secondly, no far-reaching issue of public policy is present, as alleged. The ruling of the district court and the Fifth Circuit involved a specific group of claimants who had been injured in a rather novel and involved factual circumstance. While it is beyond question that *Consolidated*, and in particular *TESTBANK*, may have involved broad questions of public policy, the case now before this Court on a petition for certiorari is simply a highly fact-specific application of one or both of those cases.

Petitioners also argue that this Court has cautioned against use of summary judgment procedures. They quote

in support of this some older precedents.[25] This is an effort to ignore the guidance on summary judgment procedures provided by this Court in the very important series of cases decided on the subject in 1986.[26] These cases provide expanded and up-to-date guidance on the uses to which summary judgment procedures should be put. The general guidance to be found in this trilogy transcends their factual context because it is consistent over a broad spectrum. *Matsushita* was an antitrust case; *Celotex* was a toxic tort case, and *Anderson* was a libel case. As to general policy, it is clear that summary judgment is not to be considered a harsh and drastic remedy disfavored by the courts. In *Celotex*, this Court said:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the 'just, speedy and inexpensive determination of every action.'[27]

This Court then went on to point out that Rule 56 must be read not simply to protect the rights of plaintiffs with real claims, but also the rights of defendants to dispose of claims which do not have a sufficient basis.[28]

It is clear that this Court intended the review of factual evidence to extend beyond the simple question of whether there is any possible factual dispute to the quality and quantity of the evidence. Three years of discovery had provided for the district court an ample factual basis in the instant case. In *Anderson*, it is pointed out that genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant.[29] Summary judgment is to be granted if the pretrial evidence presented to oppose it "is merely colorable" or "is not significantly

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[25] *Kennedy v. Silas Mason & Co.*, 334 U.S. 249 (1948); *Arenas v. U.S.*, 322 U.S. 419 (1944).

[26] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita v. Zenith*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

[27] 477 U.S. at 327.

[28] *Id.*

[29] 477 U.S. at 249.

probative."[30] It would be presumptuous to further explain to this Court the clear guidance provided by that important trilogy of cases.[31] It is sufficient to state that Petitioners' effort to argue that the district court erred in granting summary judgment on the issues presented, and that the Fifth Circuit "has sanctioned a gross departure from Fed. R. Civ. P. 56" in affirming, is absolutely unfounded.

In arguing that the Fifth Circuit has not followed its own authority, Petitioners cite *Horton & Horton, Inc. v. T/S J.E. DYER*[32] and *Watz v. Zapata Offshore*[33]. They also cite *Nunley v. M/V DAUNTLESS COLCOTRONIS*[34] and *Commercial Transport Corp. v. Martin Oil Service*[35]. These cases do not stand for the propositions for which Petitioners cite them.

Horton and *Commercial Transport* are both outdated, for two reasons. First, they are long prior to *TESTBANK* and *Consolidated.* More importantly, they are outdated for a reason which is clear when the full passage from the first edition of Gilmore and Black, which is quoted in the opinion and relied on by Petitioners, is read. That context[36] shows that the distinction being drawn is between shore law, where contributory negligence was, in 1957, often a total bar to recovery, and the then existing admiralty law, which used the half-damages rule in collision cases. Since 1957, contributory negligence as a bar to recovery has been almost entirely replaced ashore by some form of comparative fault, while the arbitrary half-damages rules in collision cases in admiralty was replaced in 1975 by the proportionate fault rule of *Reliable Transfer.*[37]

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[30] 477 U.S. at 249-250.

[31] *See,* also, generally, Fitzwater, Johnson and Henry; *Recent Summary Judgment Jurisprudence,* 5 Fifth Circuit Reporter 767 (September 1988); Childress, *A New Era for Summary Judgments,* 116 F.R.D. 183 (1987).

[32] 428 F.2d 1131 (5th Cir. 1970).

[33] 431 F.2d 100 (5th Cir. 1970).

[34] 727 F.2d 455 (5th Cir. 1984).

[35] 374 F.2d 813 (7th Cir. 1967).

[36] G. Gilmore and C. L. Black, *The Law of Admiralty,* § 7.5, p. 404 (1st Ed. 1957).

[37] *United States v. Reliable Transfer,* 421 U.S. 397 (1975).

Watz[38] was a personal injury case which applied state law, rather than maritime law. The state law represented the expansive philosophy of tort law, which is opposed to the philosophy of this Court in property damage cases as set out in *East River Steamship*[39]. Furthermore, the portion of the Restatement quoted in *Watz*, upon which Petitioners rely, was adopted only in connection with the argument made by one of the defendants against whom there was a products liability claim.

Petitioners further argue that the decisions of the district court and the Fifth Circuit were based on the activity of third parties constituting a "superseding cause", or an independent intervening force. In the first place, a careful reading of the decisions of the district court and the Fifth Circuit clearly indicates that any such argument is rendered highly questionable by the face of the opinions themselves, neither of which indicate a ruling on any such narrow basis. Secondly, both *Horton* and *Commercial Transport*[40] were cases that dealt with "subsequent intervening negligence." This is nothing but a convenient means of discussing a particular category of cases which involve analysis of foreseeability under specific circumstances, where two independent forces act, and the second causes harm which would not have been caused by the first[41]. This is by no means a separate category of cases, in which the actions of the Court should be guided only by similar cases. This is simply a sort of case in which the foreseeability to be reviewed includes both the foreseeability of the intervening force and that of the other elements to be considered in cases which lack an "intervening force." The important point is that the analysis of foreseeability with respect to the intervening force is not a substitute for the analysis of foreseeability with respect to the original actor. It is an additional step which may intervene to exonerate the original allegedly negligent party.

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[38] *Watz v. Zapata Offshore Co.*, 431 F.2d 100 (5th Cir. 1970).

[39] Note 12, *supra*.

[40] Notes 32 and 35, *supra*.

[41] *Prosser and Keeton on Law of Torts*, § 44, p. 301 *et seq.* (5th Ed. 1984).

In an effort to buttress their argument, Petitioners also cite *Nunley v. M/V DAUNTLESS COLCOTRONIS*[42]. This case is so far afield factually from *Consolidated, TESTBANK,* or the case before this Court, that it offers nothing of relevance in connection with the district court's order and the opinion of the Fifth Circuit. The issue decided in *Nunley* was that the terms of the Wreck Act did not interpose a non-negligent party, who had failed to carry out successfully his duty to mark a wreck, to supersede the liability of a concededly negligent party who was responsible for sinking the wreck in the first place. The *en banc* Fifth Circuit was concerned to enforce the Wreck Act in accordance with its terms; the main concern was that the statute not be summarily applied so as to exonerate the parties who caused the sinking of the barge and place the whole fault on other relatively blameless parties who had simply been unable to locate the wreck in order to mark it.

IV.

Conclusion

It is clear from the foregoing that this case is one which was decided on a very specific set of facts by the district court and the Fifth Circuit, and which does not involve issues of broad applicability. Petitioners argue that broad matters of policy applicable to many other oil pollution cases are here involved. As has been pointed out above, the issue with respect to Petitioners is an extremely straightforward one, and one which simply involves the question of whether or not a cause of action is available under their specific factual circumstances. Broader questions of liability to others on the coast and elsewhere are still to be addressed in the main action from which this is an interlocutory appeal.

The Fifth Circuit is far from sanctioning "a gross departure from Fed. R. Civ. P. 56", as Petitioners allege.[43] The district court and the Fifth Circuit have followed with care

[42] 727 F.2d 455 (5th Cir. 1984).

[43] Petition, p. 5.

the guidance from this Court on the standards for summary judgment and the uses to which this mechanism is to be put in protecting the rights of defendants to dispose of claims which do not have a sufficient basis.[44]

Both the district court and the Fifth Circuit reached a principled, reasoned and correct decision based on ample precedent within that circuit. There is no question presented here of a broad issue of public policy; there is no issue of federalism or the uniformity of maritime law; there is no implication that the circuit court has disregarded its own precedents, nor is there any indication of a conflict between circuits. In short, no issue is presented which would justify review by this Court.

Respectfully submitted,

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89-327

No. 88-2515

In The

Supreme Court of the United States

October Term, 1989

LUCAS, ET AL

Petitioners,

vs.

LLOYD'S LEASING, ET AL

Respondents,

vs.

CONOCO, INC.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE GALVESTON BAY FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICUS CURIAE[1]

This Brief is submitted on behalf of the Galveston Bay Foundation which believes that, within the context of a massive oil spill, owners and operators of oil tankers owe a general duty of care to people and property on the affected shore, without regard to whether such owners and operators are able to predict with certainty where the oil spill will ultimately wash ashore. The Galveston Bay Foundation was formed to "ensure there is a resource" called Galveston Bay. The Galveston Bay estuarine complex exhibits fabulous natural productivity, including 75% of Texas oysters, 33% of Texas shrimp and 50% of Texas saltwater recreational fishing. Galveston Bay is also home to approximately 30% of United States refining capacity and almost 50% of U.S. chemical production.

Oil and chemical products from these industries are transported via the Houston Ship Channel down the 50 mile length of Galveston Bay to deep water. Any spill from this transportation activity would directly affect the

[1] The Galveston Bay Foundation wishes to express its sincerest appreciation to the University of Houston Law Center, David Duncan, Assistant Director, Environmental Liability Law Program, Ms. Linda Keng, and Associate Professor Barbara White, of the Law Center for their support in the preparation of this amicus curiae brief.

$300 million annual income from commercial fishing and Bayshore recreation.

Perhaps more than any estuary in the United States, the Galveston Bay system epitomizes the tenuous balance between urban/industrial development and natural productivity. The livelihood of the people surviving on the Bay – the fishermen, the naturalist guides, the sporting goods salesmen, the moteliers and the restauranteurs – depends upon the maintenance of the balance.

To insure the maintenance of balance, one economic activity cannot be allowed to dominate another. Responsible behavior should be encouraged and harmful activity dissuaded; on Galveston Bay, a major oil or chemical spill could destroy our tenuous balance and wipe out a $300 million per year economy. Our legal system should encourage the maintenance of balance, particularly given our potential to destroy.

The Galveston Bay Foundation is submitting this amicus brief – our first – because we feel the circuit court's decision threatens our tenuous balance on Galveston Bay. Irresponsible behavior is rewarded by this decision and economic dominance is given to one industry at the expense of another. To maintain Galveston Bay, responsible behavior and balance must be encouraged. In the instant case, these principles require holding the shipping industry fully responsible for the harms to recreational property owners for damages arising from an oil spill.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that people and property on the shore are not within the foreseeable zone of danger of an oil spill and thus entitled to compensation from oil tanker owners and operators who caused that spill. Such a holding rests on the false premise that oil tanker owners and operators must be able to predict with certainty the precise location where an oil spill will wash ashore before any harm caused thereby is deemed foreseeable. The inherent unpredictability of currents, winds, and tides renders such a prediction impossible and thereby exonerates the shipping industry from responsibility for massive oil spills.

Secondly, summary judgment procedures are inappropriate in complex matters of far-flung public import. This Court has repeatedly cautioned against summary disposition of matters with wide ranging legal and economic consequences based solely on affidavits and briefs. Genuine issues of material fact exist in the case at bar. Additionally, undisputed damages to individual property interests and significant harm to the environment occurred. It is unwise, as a matter of sound public policy, to allow an action with far reaching individual and environmental consequences to be summarily dismissed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Finally, as a matter of public policy, the shipping industry cannot be allowed to disturb our nation's major environmental resources and ecosystems without bearing any of the corresponding costs. To allow gross incursions and disturbance of delicate environmental ecosystems without requiring the tort feasor to bear its associated

cost will cause a chilling effect on industry research and development efforts to prevent such environmental disasters. Economic responsibility for damage caused by tortious acts must be maintained in order to encourage research efforts in the area of preventative oil spill measures. Shipping industry economic responsibility is essential to maintaining the environmental dignity of waterways and natural water systems, perhaps even irrespective of fault.

ARGUMENT

THE CIRCUIT COURT'S NEW FORESEEABILITY STANDARD RESULTS IN A FAR REACHING EXONERATION OF THE SHIPPING INDUSTRY FROM DAMAGE CAUSED BY MASSIVE OIL SPILLS WHERE OIL TANKER OWNER/OPERATORS ARE UNABLE TO PREDICT EXACT LANDFALL OF SPILLED OIL.

The court of appeals determined in this case that its rationale in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987) is controlling insofar as the people and property owners on shore are unforeseeable plaintiffs. Furthermore, it held that a summary judgment ruling on such a matter of far reaching import is proper. Each contention is wrong.

The circuit court previously enunciated its standard of foreseeability in *Consolidated, supra,* that:

> harm . . . (is) . . . foreseeable . . . if harm of a *general* sort to persons of a *general* class might

> have been anticipated by a reasonably thoughtful person as a probable result of the act or omission, *considering the interplay of natural forces* and likely *human intervention*.[2]

However, in contrast to the *Consolidated* standard, the circuit court majority ruled that oil spill landfall at Galveston must have been predictable with certainty in order for harm to Galveston plaintiffs to be foreseeable as a matter of law. Thus, the "general class of victims"[3] element enunciated in the *Consolidated* standard is discarded. In its place the circuit court substituted the implied condition of *predictability with certainty*. This new standard severely restricts the universe of potential plaintiffs in massive oil spill disasters. Indeed, whenever massive oil spills occur a substantial distance from a coastline, there could be no redressable harm since ultimate landfall of the oil spill "bullet" would be impossible to predict. Such "far-reaching exoneration of the shipping industry from responsibility"[4] for massive oil spills cannot be permitted.

Indeed, this new standard will have an impact far beyond the circumstances of this case.

The assumption of the circuit court majority that the area of possible landfall of the oil spill could have been any point along the Texas coast, up to 340 miles of coastline to the south and west of the spill[5], has no basis in

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[2] *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68 (5th Cir. 1987) (emphasis added).

[3] *In re Alvenus*, 868 F.2d 1447, 1449 (5th Cir. 1989).

[4] *Id.* at 1450 (Higginbotham, J., concurring in part and dissenting in part).

[5] *Id.* at 1449.

fact. The court, for instance, assumes that the spill would travel only west, which was the actual direction of dispersion, but was by no means the only direction the oil could have traveled. The court also limits the "foreseeable" area of effect of the spill to the area from the point of the spill to the Texas-Mexico border – why that arbitrary point? The court then uses the randomly assigned range of 340 miles of coastline to justify their conclusion that it was not foreseeable as a matter of law that over two million gallons of oil would make its way to an island a mere 70 statute miles distant. The probability that the oil would make landfall in the "populated area" of *Galveston* is certainly far greater than the probability that it would make landfall in the "populated area" of *Corpus Christi*, which is approximately 175 miles from the spill. The court's statistical analysis does not withstand close scrutiny when the basis of its reasoning is understood.

The majority opinion asserts that five and two-thirds to one is not foreseeable as a matter of law. The probability of the event at issue occurring, differently stated, is 18%. This is too high a probability to preclude claimants from recovery as a matter of law, even if one assumes that the majority's statistical reasoning is correct. Statistical evidence has been used to find foreseeability in a number of cases.[6]

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[6] *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968) (foreseeable that injuries would result in polio vaccine use, sufficient to require warning); *United States v. Tex-Tow*, 589 F.2d 1310, 1314-15 (7th Cir. 1978) ("The statistical foreseeability of

(Continued on following page)

However, there is some case precedent, and some scholarly writing, which says that statistical evidence alone is not enough to establish foreseeability. For example: " . . . mathematical probability is not the ultimate test of foreseeability, duty or negligence. . . . Probability of injury is only one of many elements to be evaluated in the duty/breach analysis."[7]

Simplicity is virtue with regard to foreseeability. Complicated mathematical formulations mask a simple concept – namely, that oil, once thrown upon the seas, will go where the wind and current take it, to the detriment of the ultimate recipient. It is, therefore, foreseeable to a vessel operator that spilled oil would come ashore.

THE FIFTH CIRCUIT'S USE OF SUMMARY JUDGMENT PROCEDURES IS REVERSIBLE ERROR

Summary judgment procedures are inappropriate and constitute reversible error for any one of the following reasons:

(Continued from previous page)

an accident is a proper basis on which to affix liability." The circuit court used this language to hold a company liable for an oil spill under the strict liability provisions of the Clean Water Act); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) (statistical foreseeability of automobile accidents gave rise to manufacturer's duty to design cars to minimize injury).

[7] *Allen v. United States*, 588 F. Supp. 247, 356 (D. Utah 1984), *rev'd on other grounds* 816 F.2d 1417 (10th Cir. 1987), *cert. denied* 484 U.S. 1004 (1988); "The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train." W. Prosser, *Handbook of the Law of Torts* sec. 32 at 147 (4th ed. 1971).

1) Issues of far-flung public import should not be decided by summary judgment[8]

2) If summary judgment is used, the facts must be considered in a light most beneficial to the non-movant, (i.e. claimants/appellants)[9]

3) Questions of proximate causation are, by their nature, questions of fact and thus inappropriate for summary judgment.[10]

Massive oil spills, such as the Exxon Valdez spill in Alaska and the case at bar (approximately one-third the size of the Alaska spill), are matters of profound and lasting public import. Invariably, these accidents create major consequences for the regional environment, local and regional economies, aesthetics, and the general quality of life for the entire effected region. The massive oil spill, evidenced recently by the Alaska spill and the case at bar, has proved itself one of the most devastating forms of environmental disaster.

This Court and the Fifth Circuit Court of Appeals have repeatedly warned against the usage of summary judgment procedure in cases of this type. Indeed, this

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[8] *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948); *Anderson v. Liberty-Lobby*, 477 U.S. 242, 255 (1986) (which reaffirms the Court's view of the appropriateness of summary judgment in *Silas*); *Arenas v. United States*, 322 U.S. 419, 434 (1944).

[9] *United States v. Diebold*, 369 U.S. 654, 655 (1962).

[10] *Transorient Nav. Co. v. M/S Southwind*, 714 F.2d 1358, 1364 (5th Cir. 1983).

Court has specifically cautioned against summary judgment disposition involving matters of major public concern:

> (S)ummary judgment procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . . .
>
> We consider it . . . good judicial administration to withhold decisions of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide (emphasis added).[11]

The Fifth Circuit Court of Appeals permitted summary disposition of this matter based solely on the affidavit of appellees and briefs which claim an inability to predict ultimate landfall of the oil spill. Such a finding is contrary to any notion of fair judicial administration and has far reaching public policy implications. Should Exxon be permitted summary judgment in its favor simply by filing an affidavit which concludes that the exact location of ultimate landfall was uncertain? We think not. Likewise appellees should not be absolved of liability on this matter of far-flung public import based solely upon affidavit.

Absolution from potentially massive liability will undoubtedly result in reduced efforts to prevent oil

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[11] *Kennedy v. Silas Mason Co., supra,* at 256-57.

spills. The strongest motivation for increased safety and preventative measures continues to be the prospect of massive liability when an oil spill occurs.

Secondly, it is well settled that summary disposition of a case should only be made where the record is reviewed in a light "most favorable" to the summary judgment non-movant (i.e. appellants).[12] It is manifestly apparent that such a standard of review was not utilized by the circuit court panel.

SOUND PUBLIC POLICY DICTATES THAT THE SHIPPING INDUSTRY BE HELD FULLY ACCOUNTABLE FOR ANY OIL SPILL FOR WHICH IT HAS SOLE RESPONSIBILITY.

The policy has long been recognized that industries undertaking dangerous activities which have some chance of causing very substantial damage to innocent parties should be required to bear the responsibility for such damages when they do occur. The owners of the Alvenus should bear the responsibility for the wreck of that vessel, and the attendant oil spill, which wreaked havoc with hundreds of miles of the Texas coastline in 1984. Internalization of costs has been given as one of the fundamental bases of tort law. The social costs of an enterprise should be attributed to that enterprise, such that the true costs of its products are reflected in the marketplace.[13] It may also be said that the owners are the "cheapest cost avoiders" and are therefore in the best

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[12] *Porter v. Califano*, 592 F.2d 770, 778 (5th Cir. 1979).

[13] Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harv. L. Rev. 713, 716 (1965).

position to compensate within the framework of the marketplace for the tremendous damages caused by their enterprise.[14]

If the circuit court's reasoning is allowed to control the case, some claimants who are seeking redress for actual damages to property such as boats[15] will be precluded from recovery, since the circuit court majority has basically stated that it was not foreseeable that the oil spill would make landfall in the Galveston area. It seems ridiculous to preclude such claimants from recovery based on foreseeability, but the circuit court's opinion would do just that.

The Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") provide for strict liability in cases of "discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[16] Congress explicitly provided for "causation based" liability under the provisions of the Clean Water Act, realizing that some operators would be saddled with liability even when they were not "at fault."[17] Although the statute only allows for the recovery

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[14] Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972).

[15] 697 F.Supp. 289, 291 (S.D. Tex. 1988).

[16] 33 U.S.C. sec. 1321(b)(1).

[17] 33 U.S.C. sec. 1321(f)(1), *explained in United States v. West of England Ship Owner's Mutual Protection and Indemnity Association*, 872 F.2d 1192, 1195-97 (5th Cir. 1989).

of costs by the federal government under strict liability, this statute and its legislative intent can be analogized to the case at hand. The intent of the Congress in providing for strict liability for releases into U.S. waters was to assure that spills of oil and other dangerous chemicals would be remedied. In this case, the "tracking" claimants seek only to remedy the damage done to their homes and businesses caused by the negligence of the operators of the Avlenus.

CONCLUSION

Decisions of this Court have long recognized cautionary use of summary judgment procedures, the use of foreseeability/proximate cause standard within a reasonable context, and the overriding public policy concern of protecting our nation's environment. Additionally, this Court has long respected the principle that financial responsibility for torts should be borne completely by the tortfeasors. Public policy dictates that the shipping industry be held fully accountable for all environmental and property damage whenever it causes a massive oil spill. Certiorari should be granted by this court to permit careful consideration of these issues and the lower court's decision should be reversed.

Respectfully submitted,

JAMES B. BLACKBURN, JR.

ANTHONY R. CHASE

Dated: October 20, 1989